

Recross-examination.

Questions by Mr. McClain:

Q. What do you mean by shooting the castings out?

A. I don't know whether you know or not, the cement piles had a casting cemented in that the posts set on; it had a casting that was cemented into the top of the pile and they wanted those castings and they got me to shoot them out.

Q. Where were they?

A. All those piles were on the tower building.

Q. You did that for Simmons?

A. I done that for Simmons.

Q. You don't know who he represented?

A. He was supposed to represent the company.

Q. He was supposed to represent the company but you don't know who he represented? He might have bought those himself?

A. He might and he might not.

Reredirect examination.

Questions by Mr. Oyler:

Q. Who paid you Mr. Stockton?

A. The company paid me.

(Witness excused.)

Professor E. H. S. BAILEY, called as a witness on behalf of the plaintiffs, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. Oyler:

Q. What is your name?

A. E. H. S. Bailey.

Q. What is your business?

A. Professor of Chemistry, State University.

Q. In charge of the Chemistry department, State University?

A. I am.

Q. How long connected with the University, Professor?

A. Over thirty-four years.

Q. Do you know Dr. Sutcliffe who testified this morning?

A. I do.

Mr. Oyler: Do you want me to qualify this witness?

Counsel for defendant: No.

79 Q. You remember Dr. Sutcliffe bringing a jug of water to you?

A. I do.

Q. When was that?

A. December 31, 1917.

Q. Delivered it to you personally?

A. Yes.

Q. Did you make a quantitative analysis of it?

A. I examined it and had it examined under my direction.

Q. How much water did he bring you?

A. A small jug. I think a two quart jug.

Q. Explain to the jury what you found in that water?

Mr. McClain: If the Court please, unless the professor was present and conducted this himself, or it was conducted in his presence, I will have to object to it.

The Court: You say this quantitative analysis was made by you or under your direction?

A. Yes.

The Court: All right. Did you make a report on it?

A. I did.

The Court: Why not offer the report?

Mr. Robertson: Yes, let's have the report.

Q. I hand you a couple of little bottles and ask you if you prepared those?

A. I did.

Q. Just tell the jury how you come to have those bottles and what is in them?

A. On Tuesday morning I put some fresh meat. Tuesday of this week, Tuesday afternoon of this week I put some fresh meat in this bottle and poured some of this liquid that came from the jug into the bottle; at the same time I put some fresh meat in ordinary cistern water and put it in this other bottle; this meat turned white within less than half an hour, and this remained normal color except it is decomposed.

Q. The bottle that has the meat now having the appearance of being cooked is the water Dr. Sutcliffe brought to you?

A. Yes, the water Doctor Sutcliffe brought to me; this has not decomposed, that has not rotted, and this is very rotten.

Q. The one that has the reddish appearance?

A. Is very rotten, been standing three days.

Mr. Oyler: We offer these bottles in evidence, Your Honor.

Mr. McClain: We object, until I examine this witness, it may remove our objection.

The Court: Allow the Professor to read the report of the analysis, and explain it, if it is not understandable to the average man.

50 Mr. Robertson: I wish you would state to the jury what the analysis shows?

A. Shall I read the letter?

The Court: Yes.

(Witness reading, as follows, Exhibit No. 2.)

(EXHIBIT No. 2.)

The University of Kansas,

Lawrence,

Feb. 13, 1918

Department of Chemistry,

Mr. F. J. Oyler, Iola, Kansas.

DEAR SIR:

The following is the amended report on the analysis of the liquid received from you through Dr. Sutcliffe:

	Grams per liter.	Grains per gal.
Zinc Sulphate.....	2.2625	131.944
Iron Sulphate.....	0.2109	12.290
Calcium Sulphate.....	1.7153	100.033
Sodium Chloride.....	0.3960	23.094
Total Solids.....	4.5847	267.370
Hydrogen sulphide gas partly in solution	0.0460	2.682
Acidity, due to sulfuric acid.....	8.160	475.875
Acidity, due to hydrochloric acid.....		a trace.

The Court: That is the report itself of the analysis?

A. That is the report.

Mr. Robertson: This report, which has been marked Exhibit No. —, we offer in evidence.

Mr. McClain: We object because it is supposed to be a supplemental report and therefore incompetent unless the original report just referred to is produced.

The Court: All right, you can get any he has.

Mr. Robertson:

Q. Is Exhibit No. 2 a complete report of your analysis, Doctor?

A. This is my final report.

Q. And is it complete in itself?

A. It is.

(The remainder of Exhibit No. 2, above referred to, offered and received in evidence, is as follows:)

81 "This means that the liquid contains zinc sulphate, a poison and corrosive, in considerable quantity, and also sulfuric acid (free) which gives the liquid a sour taste, and acts as a corrosive if sufficiently concentrated. The other constituents of the liquid are of little importance.

"Both sulphuric acid and zinc sulphate act on the lining membrane of the interior organs as the stomach and the lungs. Some experiments with this liquid on fresh meat show that within 12 hours it turns the meat a very light color, showing chemical action, while fresh water has little or no action upon the meat.

Yours sincerely,

E. H. S. BAILEY."

Questions by Mr. Roberston:

Q. Now what deadly poisons if any did you find in this fluid in appreciable quantities?

A. It contained sulphuric acid and zinc sulphate.

The Court: Let me see if we can shorten this matter.

Q. From your study of the science of chemistry, and your professional knowledge, do you know, Professor, whether water carrying the amount of poisonous substances that this water that you have analyzed did, whether it would be dangerous to human life to go bathing in it, or to be immersed in it?

A. It would.

Mr. Robertson:

Q. I want to ask the color of sulphuric acid such as made there, or found in this water, the color?

A. The pure sulphuric acid is colorless like water, but the ordinary commercial sulphuric acid is brownish or dark, depending on the amount of impurities it contains.

Q. Do you know as a matter of fact what sort of sulphuric acid was being made at this plant when in operation?

A. I do, commercial sulphuric acid.

Q. Is that what you call pure sulphuric acid?

A. No, commercial or oil of vitriol.

Q. Having the brownish or yellowish color?

The Court: Oil of what?

A. Vitriol.

Cross-examination.

Questions by Mr. McClain:

Q. That is not what is generally called pure sulphuric acid?

A. It is not.

Q. And not as strong?

A. It is nearly as strong, it is not the absolutely pure sulphuric acid, but it is very nearly as strong and sometimes entirely as strong.

Q. In the examination of this water, Professor, would the fact that it had been opened, say from the period of August, 1916, until you examined it, have any effect on it, suppose it had been opened at different times the bottle or jug?

A. It would have very little effect.

Q. Now these two bottles here were they prepared by you?

A. They were.

Q. And where did the water come from?

A. Which water.

Q. The sulphuric acid you used?

A. That came from the jug.

Q. That was the water in the jug?

A. It was.

Q. How long after you had analyzed it?

A. This water I put in this bottle on Tuesday.

Q. Where did you get it?

A. Out of the jug.

Q. Who had the custody of the jug from the time of the analysis?

A. The jug was in my charge.

Q. Is that the only analysis you made of that material, Doctor?

A. Yes.

Q. Did you make another written report or written analysis?

A. I made a preliminary report?

Q. In writing?

A. Yes.

Q. Have you a copy of that?

A. I don't think I have.

Q. Know where it is?

A. I do not.

Q. Was a copy mailed to Mr. Oyler?

A. I think so. I may say in explanation it was simply a preliminary report.

Q. You refer here to an amended report, that is why I want the original.

Mr. McClain: I want to offer that as a part of the cross examination.

Mr. Robertson: We offer the bottles in evidence.

Mr. McClain: Defendant objects as incompetent, irrelevant and immaterial.

The Court: They are merely offered to show the result.

(Witness excused.)

VAN BRITT, called as a witness on his own behalf, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. Oyler:

Q. Mr. Van Britt, you are one of the plaintiffs in this case?

A. Yes.

Q. Where are you now staying?

A. Iola.

Q. In the summer of 1916 where did you live and where had been your home prior to that time?

A. Well, I have always made my home in Springfield, Missouri.

83 Q. In the summer of 1916 you may tell the jury if you and your wife came to Kansas; in 1916 did you and your wife come to Kansas?

A. Well, I believe we did from Springfield, yes sir.

Q. From Springfield?

A. Yes.

Q. How many children did you have at the time?

A. We had three.

Q. In 1916?

A. Yes sir.

Q. Did you have two little boys?

A. We had four.

Q. Two girls and two boys?

A. Yes.

Q. How old were the boys Mr. Britt?

A. One was eight and one eleven.

Q. What was their condition as to being healthy or not?

A. They were.

Q. Had they attended school any?

A. They had, yes sir.

Q. What grade had they reached, if you know?

A. Well, either the fourth or fifth grade, the oldest boy was in the fourth or fifth A grade, I won't say for certain which, we have them at home. Never thought it was necessary so I never fetched them. And the other was in the third grade, Third A, I believe.

Q. Was either of them able to do any work?

A. Yes.

Q. What work did the oldest one do for you or for the neighbors?

A. Well, he helped me with the horses just as well as a man would, just as good as a hired man would help me.

Q. You buy and trade and sell horses?

A. Yes sir.

Q. Had you been in western Kansas that summer?

A. Yes sir.

Q. In the latter part of July did you come back to Iola and through Iola?

A. Yes.

Q. You have a brother living at Iola?

A. Yes.

Q. What time in July was it you came to Iola?

A. We camped out west of Iola something like two or three days before coming on into Iola, I think three or four days maybe. I will say that anyway to make it sure; when we drove into Iola was the 27th I think, 27th or 28th I won't be sure.

Q. 27th or 28th of July?

A. 27th or 28th of July, 1916.

Q. Where did you camp in Iola?

A. On East Broadway.

Q. On East Broadway; that is down in what is known as East Iola?

A. Yes.

Q. Extreme part?

A. Yes, down as far as you can get right at the end of Broadway.

Q. Do you know where the pool of water was where your little boys were taken out of later?

A. Yes sir.

Q. Did you afterwards learn where that was?

A. Yes.

Q. You may state how far you were camped from that place?

A. Something like three or four blocks south.

Q. Which way did your brother live then from where you was camped, was it northwest of where you?

A. He lived northwest from where I was camped.

84 Q. Which way was the pool from where you camped?

A. North.

Q. North?

A. Yes.

Q. You may state where your boys went that afternoon, if you know?

A. One of my boys stayed all night at my brother's the night before that.

Q. On North Fourth Street?

A. On North Fourth Street, and the other boy we sent him up after the younger one to come down to where we was camped.

Q. Now what did you later ascertain as to what happened to the children?

A. I don't quite understand the question.

Q. What did you later ascertain, or understand, or find out happened to the children?

A. Well, sir, a little boy come running over there and told my wife my younger little boy—want me to tell?

Q. Just briefly.

A. Run over there and told my wife the younger boy was drowned.

Q. You learned that he died and the other was taken out and he was taken to Sutcliffe's hospital?

A. I was there at the time.

Q. I say, that was the final result?

A. Yes.

Q. And he died also?

A. Yes.

Q. Were they obedient children? Or not?

A. Yes sir, they were.

Q. Would they mind you and your wife?

A. Yes sir.

Q. Would they help you in any way with the work?

A. I never asked them to do anything possible for them to do that they didn't do.

Q. Would the little boy help your wife about the house or do her work, just tell the jury in what way?

A. Well, the little boy helped my wife mostly in the home, helped with the work, washing dishes and sweeping, and times the oldest one did, but the most of the time the oldest was with me with the horses.

Q. Did the older boy work any that summer and earn wages?

A. Yes sir, he did.

Q. Who did he work for?

A. For Lee Huber, fellow that handled horses.

Q. How much did he receive for his work?

A. Well, be hard for me to tell exactly what he received in all total, I suppose—

Q. I didn't mean the total amount, but how much a day?

A. It would average something I reckon a dollar or over a day, what he received the time he was with him.

Q. Did he receive a horse for pay for some work he did?

A. Yes.

Q. And was he paid money for other work he did?

A. Yes sir.

Q. In July 1916 what property did you own, you and your wife?

A. Just owned horses, wagon and harness.

Q. And I believe you stated these children were both healthy and strong?

A. Yes sir.

Q. Fairly intelligent?

A. Yes sir.

Cross-examination.

Questions by Mr. McClain:

Q. You testified by deposition once before in this case, Mr. Britt, in February of last year?

A. Yes.

Q. And in that you stated during the last ten years you and your family had spent possibly half of the time traveling on the road?

A. Some part of our time, yes.

Q. You were dealing in horses?

A. Yes sir.

Q. Referring to this camp?

A. Yes sir.

Q. Where did you camp or locate your wagon that time that you came there when these boys were injured or where the accident happened?

A. On East Broadway.

Q. Were you clear out of the Creek bank?

A. No sir.

Q. How far were you from Elm Creek?

A. That is the creek in East Iola where the bridge goes across?

Q. Yes?

A. We must have been five, six blocks from that bridge.

Q. How far were you south from off this road east and west that runs along there, where the street car line is, how far were you south; oh, approximately?

A. Well, something like a couple of blocks, maybe three; right at the end of Broadway, on East Broadway; we was in the last block as far as you can go east.

Q. Now, in reference to these little boys, you say one of the boys worked and handled horses?

A. Well, he worked for a fellow that owned horses.

Q. Did he board with him?

A. No sir.

Q. Stayed at home?

A. Yes, we was together, me and this fellow.

Q. And that is the only earnings outside the work he did for you, that was the only money earning he did?

A. Well, to speak of, yes sir.

(Witness excused.)

Mr. Oyler: We call Mrs. Britt.

The Court: Does Mrs. Britt know anything that is not already in evidence in this case?

Mr. Oyler: Her testimony concerning the children will be the same as Mr. Britt's.

The Court: That, of course, will not be disputed.

Mr. Oyler: I suppose it will not be disputed.

Mr. McClain: We have no means of disputing it if we wanted to.

86 Mr. Oyler: Very well, that is all; we rest.

Plaintiffs rest.

Thereupon, at the close of plaintiffs' evidence the defendant files a demurrer to the evidence, as follows:

District Court of the United States for the District of Kansas, Third Division.

No. 289.

VAN BRITT & SUSIE BRITT, Plaintiffs,

v.

THE UNITED ZINC AND CHEMICAL COMPANY, Defendants.

Comes now the defendant, at the conclusion of plaintiffs' case, and presents this the motion praying the Court for a directed verdict in favor of defendant, in the nature of a demurrer, on the following grounds and for the following reasons:

First, the evidence offered by plaintiffs in support of the allegations of their petition do not show facts sufficient to constitute a cause of action against defendant.

Second, plaintiffs have not the legal capacity to maintain this suit.

BAXTER McCLAIN,
ASHLEY & GILBERT,
Attorneys for Defendant.

(Endorsed:) No. 289. Van Britt and Susie Britt v. The United Zinc and Chemical Co. Demurrer. Filed May 10, 1918. F. L. Campbell, Clerk. C. N. Price, Dept. Clerk.

The Court: Demurrer overruled. We will hear the entire case. Defendant excepts.

(Jury duly admonished; recess until two o'clock P. M.) (2:00 o'clock P. M.)

Mr. Oyler: If the Court please, I would like to ask Mr. Britt one question.

The Court: Very well.

Mr. VAN BRITT (recalled).

Direct examination.

Questions by Mr. Oyler:

Q. Mr. Britt, I wish you would tell the jury whether or not the boy who was drowned could swim?

A. Yes sir.

(Witness excused.)

Mr. Oyler: Plaintiffs rest.

87 Thereupon, the defendant, to maintain the issues upon its part produced and offered evidence, as follows:

W. A. WHEELER, called as a witness on behalf of the defendant, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. McClain:

Q. State your name?

A. W. A. Wheeler.

Q. Where do you reside?

A. Iola, Kansas.

Q. What is your business?

A. Insurance agent.

Q. How long have you resided in Iola?

A. Fifteen and one-half years.

Q. What if any position do you occupy there Mr. Wheeler, public position?

A. I am secretary of the Board of Education, Secretary of Iola Commercial Club, and Allen County Fuel Administrator.

Q. Are you acquainted with the territory in and about Iola?

A. Yes sir.

Q. And have been for some time?

A. Yes sir.

Q. Have you been in court during the testimony of plaintiffs witnesses in this case?

A. I have.

Q. Calling your attention to the site formerly occupied by the United Zinc and Chemical Company plant, are you acquainted with that?

A. Yes.

Q. How long have you known that?

A. I have known the plant and the site for a good many years probably ten years.

Q. Were you acquainted with it on or about the time of the alleged death of these Britt boys?

A. Yes.

Q. Were you out there at that time?

A. Yes.

Q. State the circumstances under which you were there?

A. I had gone out there to look at the paving plant of the Kaw Paving Company which was operating there at the time, on this site.

Q. What part of the site?

A. On the south side next to the track.

Q. All right?

A. And after looking over the plant in company with Mr. Frye we went north across the site to look at a brick building that still stood on the site, and as we approached that building we met a bunch of men carrying this body of the boy they had just taken out of the basement.

Q. The boy that was dead?

A. Yes.

Q. Dead at that time?

A. Yes.

Q. Where was the other boy, if you saw him?

A. He was there with the crowd, walking along with the rest of them.

Q. Did you afterwards see him go home or taken home?

A. No, I think I went home before they took him home, he was lying in the seat of the buggy when I went away.

88 Q. What is the general appearance of that tract now as compared to the 28th day of July, 27th day of July, 1916?

A. It is just the same as it was with the exception of the building having been taken away.

Q. Brick building?

A. Brick building.

Q. Calling your attention to this map, which I will have the reporter designate, marked Exhibit No. 3, I will ask you to state whether or not that is the official map, or used as the official map of the city of Iola and vicinity?

A. Yes sir.

Q. Calling your attention to the tract east of the main part of the city, I will ask you to indicate with a pencil this tract of the United Zinc and Chemical Company?

A. It extends from this point here, over here; takes in this long black mark here, this one; and thence runs up in there and down to the railroad. (Indicating.)

Q. I will ask you to state whether or not that map was taken at the time all the structures were in existence on this tract?

A. Yes at the time that map was made that plant was in operation.

Q. Calling your attention to what has been referred to in this case as the basement, or where the pool of water was, indicate on the map where this was, as nearly as you can?

A. Right in about there, where that black spot is, which is a little to the west of this one.

Q. At the southern end of that long building?

A. Yes.

Q. With reference to the eastern boundary of the tract, very close to the eastern boundary?

A. Very close to the eastern boundary.

Q. As to north and south it was about mid-way?

A. Yes.

Q. Where was the road in that tract Mr. Wheeler, at that time, as you observed it?

A. Well, the place to cross the tracks was down here west of this Clayborne's mill.

Q. That black spot is Clayborne's mill testified to by some of the witnesses?

A. Yes.

Q. Go ahead?

A. The road is west of Clayborne's mill; after you get around to the mill, turn to the east, there are several roads there that you drive most anywhere this side of these tracks but be difficult to get on the east side of this track.

Q. This spur that runs clear to the north end?

A. Yes.

Q. Was that spur in at the time?

A. Yes.

Q. Where was the Kaw Paving Company working on that tract?

A. Right in this little point here, this spur that leads here.

Q. In the indenture formed by the spur leading off north of the Missouri Pacific and the one that goes to the east?

A. Yes.

Q. What was on the south side of this tract Mr. Wheeler, what was the first thing there?

A. Of this tract of land?

Q. Yes?

A. The first thing there is the street car track.

Q. Is it, or the Missouri Pacific?

A. The Missouri Pacific is north of the street car track.
89 the street car track is next to the road.

Q. Where does the Missouri Pacific track go?

A. Out to the Prime Western.

Q. Where is the Prime Western?

A. Plant right east, right here (indicating).

Q. Between the Missouri Pacific and the public road is there another railroad?

A. Iola Electric.

Q. North of this tract what is there?

A. M. K. & T. Ry.

Q. Do you happen to know the dimensions of this tract, Mr. Wheeler, offhand?

A. Approximately one thousand feet across, one thousand or twelve hundred feet across it.

Q. Have you observed the fact, Mr. Wheeler, to see whether or not any one from off the tract, standing off that tract of ground, could see this basement where this water collected?

A. No, I don't think they could see it, from the road or from either one of the railroad tracks.

Q. Could they see it from the west?

A. At a distance of possibly one hundred, one hundred and fifty, two hundred feet might see it from the west.

Q. Over in the neighborhood of the spur that ran north?

A. Yes.

Q. I believe you stated the condition of the tract except where this one building was torn down was about the same it was on the day the accident occurred?

A. Just about the same.

Q. Now you may state whether or not you had any of this water analyzed or were instrumental in having it analyzed?

A. Yes, I had a request from parties to have it analyzed.

Q. Who were the parties?

A. Messrs. Ashley & Gilbert.

Q. With reference to the date of this accident when was it?

A. I don't know the exact date, it was shortly afterwards, within a week I presume.

Q. Within a week you would say?

A. Yes.

Q. Was there water taken?

A. Yes.

Q. Who took it?

A. Mr. Brown and Mr. Fennell.

Q. You may also state whether or not you had occasion to examine this pool of water, this basin?

A. Yes.

Q. At or about the time of the injury or accident or shortly after it?

A. Just a day or two afterwards I did.

Q. What was the purpose?

A. Seeing what the conditions were there.

Q. Had some order been made with reference to filling it up or something of that sort?

A. Yes, the county health officer had ordered it.

Q. Who was that?

A. Mr. Sutcliffe.

Q. He had ordered it fenced or filled up?

A. Yes.

Q. Was that done?

A. It was filled.

90 Q. Do you recall the excessive rainfall that occurred in that vicinity along about the sixth of September, 1915?

A. Yes sir.

Q. To call your attention more definitely, it was a week after the Allen County Fair in 1915?

A. Yes.

Q. Did you have occasion to notice where the water came to at the time, or can you state on this map?

A. I don't know as I could tell on that tract but it came within a block of Kentucky in most of East Iola; now this red line here, that street down there is Kentucky; down in this neighborhood just south of the Missouri Pacific the water was within a block of Kentucky street; now I wasn't up in here, but down in here, it came up here within a block; people all in this part of the town were forced out.

Q. Now another question I want to ask you, you will note the building farthest east on Broadway?

A. Yes, corner of Broadway and Tenth, (indicating).

Cross-examination.

Questions by Mr. Oyler:

Q. This property belonging to the United Zinc and Chemical is outside of the corporate limits of the city of Iola, is it not?

A. Yes.

Q. Where the water came up in September 1915 down through here that is much lower land than it was up here, isn't it?

A. It may be a little, not much difference.

Q. Don't you know there is a rise just north of Iola Electric up there?

A. There may be some rise but not very much difference.

Q. You don't undertake to say to the jury, do you, Mr. Wheeler, the water ever got north of the Iola Electric track there?

A. Oh yes.

Q. Where?

A. It came up here and put the fires out in the Prime Western.

Q. But that is very low down in there, isn't it?

A. No, not much lower than this.

Q. Between the Prime Western and the M. K. & T. track?

A. Natural ground. In back of the Prime Western here it is filled in largely from other ground; any place where the ground is natural ground it is just about the same all along here, not much difference.

Q. You mean to say it is higher here than here where this smelter is?

A. Not very much.

Q. Don't you know it is at least six feet higher, or more, here than it is there?

A. No sir.

Q. Don't you know the highest the water ever was it only came up to the office of the Prime Western on the west of their building?

A. No, it flooded their office.

Q. You mean it got so high it ran into the office?

A. Yes.

91 Redirect examination.

Questions by Mr. McClain.

Q. Mr. Wheeler, I will ask you to state whether or not there was any trees or other thing that would attract particular attention to this basement until you got up reasonably close to it?

A. No sir.

Recross-examination.

Questions by Mr. Oyler:

Q. The Prime Western had never manufactured sulphuric acid?

A. I don't know.

Q. Or any other acid plant except the United Zinc and Chemical Company?

A. I don't know what they did manufacture.

(Witness excused.)

Mr. A. E. GIBSON, called as a witness on behalf of the defendant, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. McClain:

Q. Mr. Gibson, state your full name?

A. A. E. Gibson.

Q. Where do you reside?

A. Iola, Kansas.

Q. What is your occupation?

A. Photographer.

Q. How long have you been engaged in that business?

A. About sixteen years in Iola.

Q. I will ask you to state whether or not you are familiar with the United Zinc and Chemical Company tract east of Iola?

A. I know the location, have seen it several times, been by there several times.

Q. On the public road?

A. Yes.

Q. As to general appearance what would you say—I will withdraw that. Have you been on that tract recently?

A. Yes.

Q. I will ask you to state as to the general appearance, whether it was about the same as it has been for the last four, five, six years?

A. I think so.

Q. I will ask you to state whether or not at my request you took some views of this tract from different directions?

A. I did.

Q. And were those reduced to prints?

A. Yes.

(Photographs marked exhibits 4 to 9, inclusive.)

Mr. McClain: I will ask the map, Exhibit No. 3, be considered in evidence in connection with Mr. Wheeler's testimony; I do not want to leave it here.

The Court: Very well.

92 Exhibit No. 4 shown to witness.

Q. You may state Mr. Gibson if that is one of the pictures you took?

A. It is.

Q. And you may state from what viewpoint?

A. This is made from the west side of the tract.

Q. Of this United Zinc and Chemical Company tract?

A. Yes.

Q. And about what distance north and south?

A. About midway I judge.

Mr. McClain: Exhibit No. 4 is offered as a part of the witness' direct examination.

(Exhibit No. 4, above referred to, offered and received in evidence, is attached hereto and made a part hereof.)

Exhibit No. 5 shown witness.

Q. I will ask you to state what that is Mr. Gibson?

A. This is made from the east side of the tract.

Q. That is the picture you made from the east side of the tract?

A. Yes.

Q. With reference to the distance north and south about what was it, approximately midway?

A. Approximately so, yes.

Q. I might ask you Mr. Gibson in connection with these pictures, Exhibits 4, 5, 6, 7, and 8, whether or not they were taken

either right at the edge of the tract or right immediately at the edge of the tract from the different directions?

A. Well, just close to the edge.

Exhibit No. 6 shown witness.

Mr. Oyler: If the witness will say these are views he made out there——

Mr. Robertson: Let us look at them I think we will have no objection at all. (Looking at the photographs referred to.) We have no objection to them at all.

Mr. McClain:

Q. Mr. Gibson did you note the location of this basement or pool of water with reference to the east line of this tract?

A. Well I couldn't tell just where the line was, it was over toward the east side.

Q. Very close to the east line?

A. Yes.

Q. And as to the north and south direction, what would you say?

A. Well, I judge about near the center that way.

Q. Midway?

Mr. McClain: In connection with Mr. Gibson's evidence I desire to offer photographs 4 to 9, inclusive.

(Here follow photographs marked pages 92a to 92f, inclusive.)



EXHIBIT NO. 4.



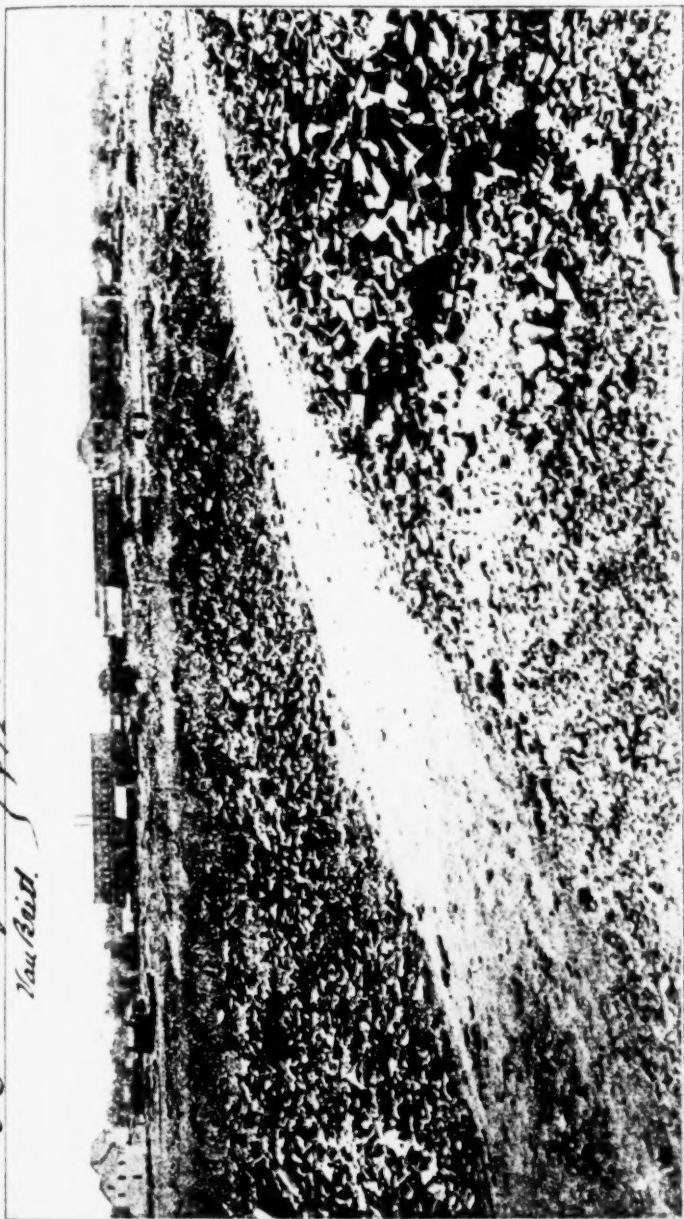


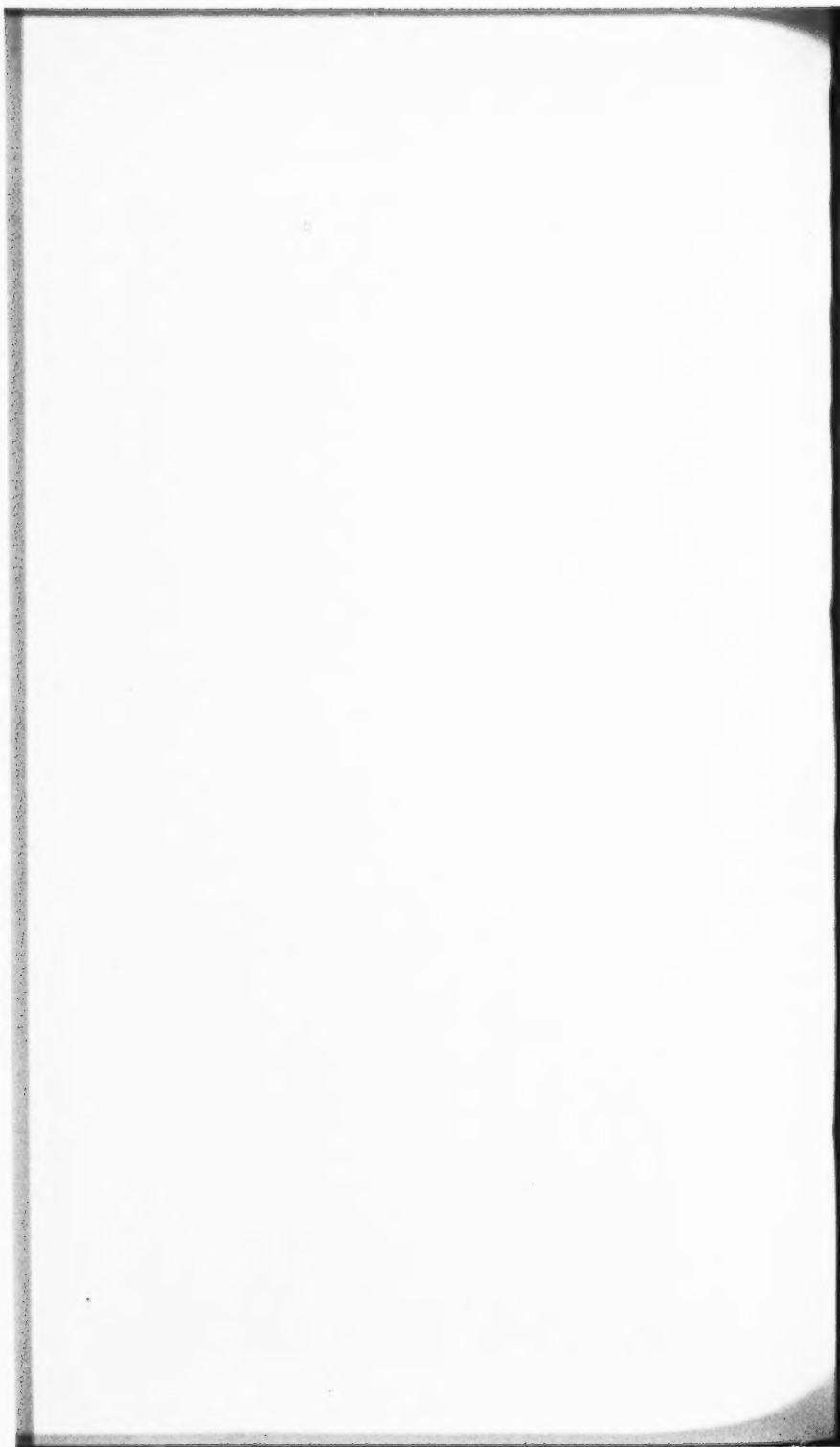
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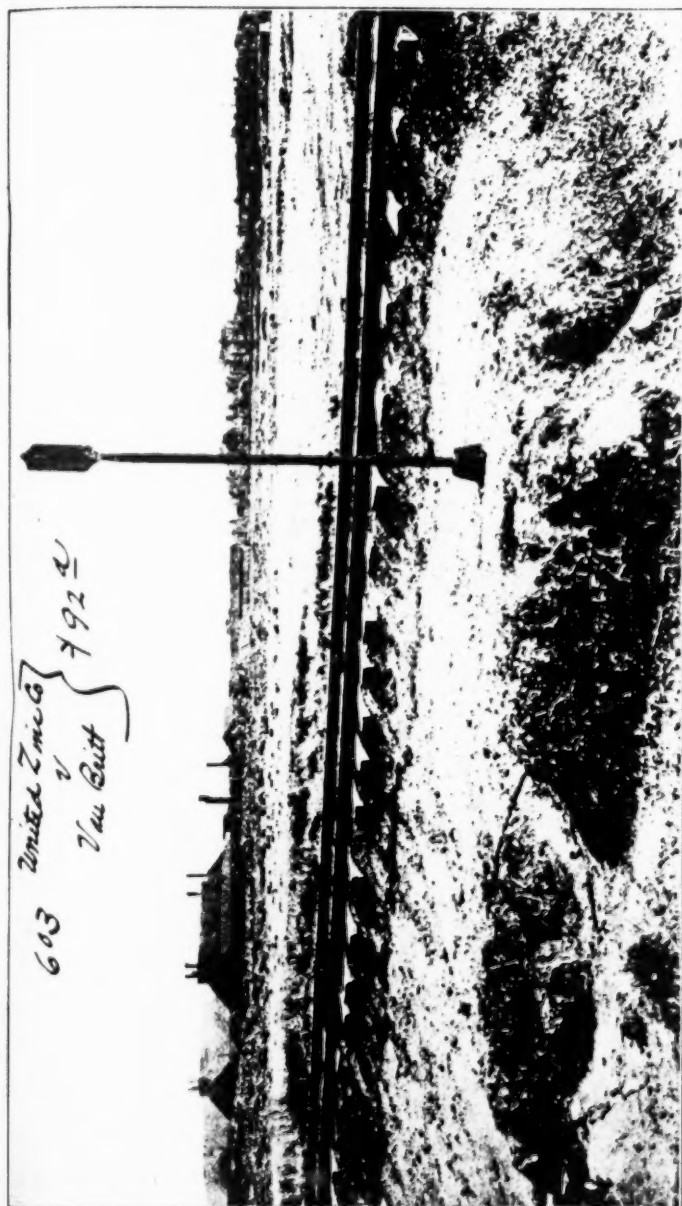
603 United Zinc Co. } p 92 &
New Brit.





EXHIBIT NO. 6.





603
United Zinc Co.
v
Van Brit } 792

EXHIBIT NO. 7.





EXHIBIT NO. 8.

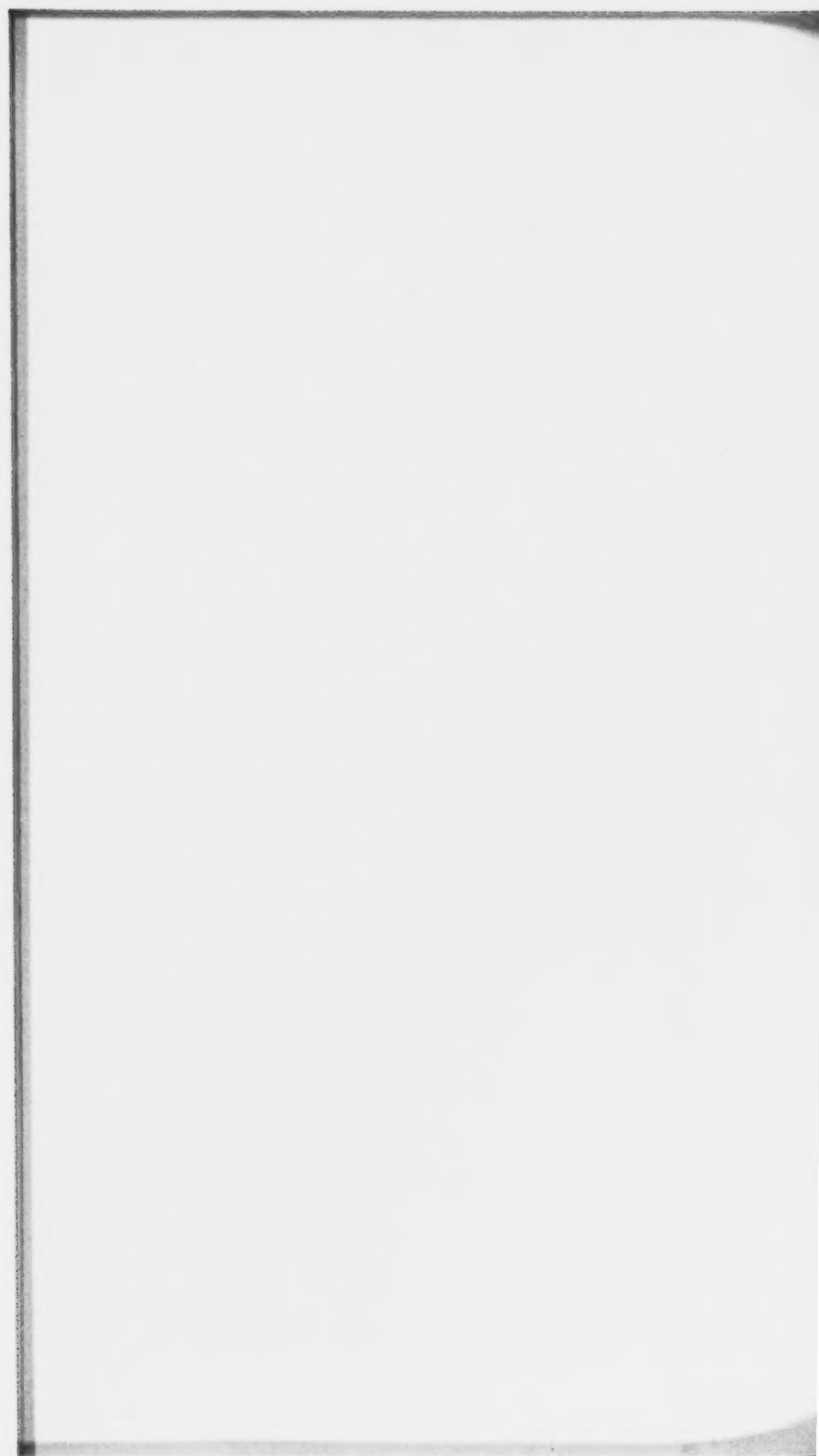
623 United Zinc Co. p 92
Van Brit





EXHIBIT NO. 9.

603 United Zinc Co.
v. Britt
p 92



93 The Court: Very well, let them go in.

(Photographs, marked Exhibits 4 to 9, inclusive, above referred to, offered and received in evidence, are attached hereto and made a part hereof.)

Cross-examination.

Questions by Mr. Oyler:

Q. Who was with you when you took those photographs?

A. Mr. McClain at one time, Mr. Wheeler and two other gentlemen at another time.

Q. You took them at the request of the defendant?

A. Yes.

Q. At such places as they would suggest?

A. Well, Mr. McClain, to be accurate, says, "anywhere so you can get a good average view of the plat.

Q. Showing where the buildings had stood and the bricks and debris were, if any, for the purpose of getting that?

A. Well, nothing said about it, nothing said about it.

Q. Nothing said about trying to get a plain view of the pond, was there?

A. Mr. McClain said he would start over in the direction of the pond and stand there.

Q. It was filled up there recently?

A. I was all around that pond and never saw it until yesterday I made some views and saw it.

Q. When did you make them?

A. Part of them Friday week ago today and part of them Tuesday afternoon.

Redirect examination.

Questions by Mr. McClain:

Q. I will ask you to state Mr. Gibson whether or not these pictures were not taken from these four cardinal points or views with the idea of focusing on a man standing by this foundation?

Mr. Oyler: To which we object as calling for a conclusion and self-serving purposes.

The Court: Answer.

A. Yes sir.

(Witness excused.)

D. W. BROWN, called as a witness on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

Question- by Mr. McClain:

Q. State your name?

A. D. W. Brown.

Q. Where do you reside?

A. Gas City.

94 Q. That is near Iola?

A. Four miles.

Q. What is your occupation?

A. Chemist.

Q. For what company are you employed?

A. Prime Western Smelter Company.

Q. How long have you been in such employ?

A. Three years next September.

Q. Are you a graduate of some school?

A. No sir.

Q. How?

A. No sir.

Q. Where did you acquire your chemistry?

A. I got two years at Indiana University, one year at College of Emporia, and one year at Kansas City University.

Q. Who was your instructor or Professor there?

A. Mr. Bailey or Doctor Bailey was the Senior Chemist and Doctor Kay was his assistant, I was under Doctor Kay.

Q. That is the Doctor Bailey who testified?

A. Yes.

Q. I will ask you to state whether or not at the instance of Mr. Wheeler you made—what do you call it—a test of the water in a certain excavation on the United Zinc and Chemical Company's ground?

A. No, Mr. Wheeler never said anything to me about it.

Q. Who was it?

A. Mr. Fennell.

Q. He was the superintendent of your plant?

A. Yes, the superintendent of our plant.

Q. Do you know where the basement which has been described in this case was located on that ground?

A. Yes sir.

Q. Did you know at the time you went out to take the test?

A. No sir.

Q. Do you pass along to the south of this tract frequently or have you in the last few years?

A. I did when I lived in Iola.

Q. Did you in 1916?

A. I lived there four months and went by every day to work on a car.

Q. Do you recall a high water in the fall of 1915, September?

A. Yes sir. I was living in Iola then.

Q. How high up did it come at that time and place?

A. Well, we went out to work that morning of the flood and the car couldn't run; it was over the street car track. Clear over that.

Q. How far up, just indicate, on the map, this being Kentucky street?

A. It come up about here.

Q. About Clayborne's mill?

A. About Clayborne's mill, the track was covered in there.

Q. That is all low ground out in that direction, is it not Mr. Brown, south of the Katy tracks?

A. South of the Katy it is all low except where the residue is dumped in. We were to go out on the Missouri Pacific tracks and it was covered with water.

Q. When did you take this test or analysis of the water in this excavation?

A. It was the week following the disaster, probably Wednesday or Thursday.

95 Q. State what you did?

A. We took four glass stopper bottles containing about a gallon each and drove over with Mr. Fennell and we took two samples of water from the middle of the surface of the pond, by tying two strings to the bottle and filling it in the center and pulling the cork out.

Q. The same method as described by Doctor Sutcliffe?

A. That was from the surface; and two bottles from the deepest part of the excavation; and these were stoppered and taken over to the laboratory.

Q. Who did that?

A. Mr. Fennell and myself.

Q. Were you present all the time?

A. Yes.

Q. Who conducted the analysis?

A. I did.

Q. In your line of work Mr. Brown what particular minerals or elements are you required to look for *any* pay attention to?

A. Zinc is the chief element; it is a zinc smelter; and the other elements are calcium, iron, lime, magnesium and sulphur.

Q. Well, zinc sulphate, is that an important part of your work?

A. Yes.

Q. Exhibit ten is shown the witness; I will ask you to state Mr. Brown what that is with reference to your analysis?

A. That is the analysis that I made of that water.

Q. Have you compared your analysis with the analysis of Professor Bailey?

A. Yes sir.

Q. What is the comparative fact of those Mr. Brown?

A. I find two important elements, the sulphur and zinc that he got 131 grains per gallon of zinc sulphate, where I got 82; and on sulphuric acid I think he got 475, didn't he, and I got 107.

Q. Have you a complete analytical laboratory out there Mr. Brown?

A. Yes sir.

Q. Do you do anything else than make assays and tests?

A. I didn't at the time, I have a little work outside the plant now.

Q. Are you acquainted with the properties of zinc sulphate?

A. Yes sir.

Q. Is that present in this water?

A. Yes sir.

Q. Are its properties pretty generally known and agreed upon by the sciences?

A. Its properties are, yes sir.

Q. Have you a book or authority here of acknowledged standing?

A. I have the United States Dispensatory.

Q. Is that a book of acknowledged standing?

A. Yes.

Q. Will you produce it please. I want to refer to a paragraph.

(Witness producing book.)

Q. Calling your attention to page- 1214 and 15 of the 20th Ed. Remington and Wood, United States Dispensatory, published by J. P. Lippencott, I will ask you to read that paragraph into the record, and I offer it as a part of your testimony: indicated by the check mark, pencil check mark.

Mr. Oyler: If the court please, the plaintiffs object as incompetent, irrelevant and immaterial, and cannot be offered for the purpose of bolstering up the testimony of their own witness. Can only be offered on cross-examination.

Mr. McClain: If the court please, I am not offering it in that connection at all, not to bolster it up at all; I use him as a means of introducing the proof.

Mr. Oyler: We object as incompetent, if your Honor please.

The Court: The trouble is, you don't have a great deal of evidence here as to the competency of the writer of this. What does this man know about the knowledge of this man.

Mr. McClain: Not a thing; he has testified this is a book of acknowledged standing in that line; that is all I know. I am not insisting on it; I would like to show it for the purpose of showing the symptoms of zinc sulphate taken into the system.

The Court: All right.

Mr. Robertson: I think, Your Honor, he should read the whole article.

The Court: Offer all and you can use it in argument.

Mr. McClain:

Q. Read the paragraph I have checked into the record.

A. Zinc sulphate, in an overdose, acts as an irritant poison. Besides vomiting and incessant retching, it produces anxiety, distressing restlessness and extreme prostration. Few cases are on record of fatal poisoning by this salt, the patient being generally re-

Works No. _____

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THE UNITED ZINC & CHEMICAL CO. VS. BRITT

96-A

ASSAY CERTIFICATE

Date 12/14 1917

No. _____ Assay on _____

United Zinc and Chemical Co. Pond

[illegible]

QuBrown Chemist.

EXHIBIT NO. 10.



lieved by its prompt expulsion in vomiting. Death is said to have been caused, however, by an ounce and a half."

(Witness excused.)

RICHARD FRIEBEL, called as a witness on behalf of the defendant, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. McClain:

Q. State your full name?

A. Richard Friebel.

Q. Where do you live now Mr. Friebel?

A. Hillsboro, Ill.

Q. How long have you lived there?

A. Since 1911.

Q. What is your occupation?

A. Assistant superintendent.

Q. What is your business?

A. Have charge of a sulphuric acid and roasting department.

Q. Of what company?

A. American Zinc Company of Illinois.

(Here follows certificate marked page 96A.)

Q. Were you in charge of a smelter operated for the United Zinc and Chemical Company at or near Iola at any time?

A. I was supervising the management of the acid department of the United Zinc and Chemical Company during its duration in Iola.

Q. While it was at Iola?

A. Yes.

Q. Were you there at the time the sulphuric acid part of this plant was dismantled?

A. I was.

Q. You may describe briefly, Mr. Friebe, the process of making sulphuric acid there as conducted at that particular plant; make it short. Describing the building?

A. That is quite a long talk.

Q. Well, how was it made, in a general way?

A. Well, we roast the ores.

Q. What kind of ores?

A. Joplin ores.

Q. Zinc?

A. Zinc ore.

Q. Well, was it zinc sulphate?

A. Zinc sulphate; that was roasted in a roasting kiln, Hegler kiln, and from there passes fumes through a dusting chamber collecting all the fine sediment in the gases in order to make clear acid; from there we had a fan drawing this hot gas through a tower called the glover-tower, through which we run a weak solution of sulphuric acid, but it is weak; the heat coming off this hot gas would concentrate this weak solution to a bonny strength, which is sixty degrees, as required.

Q. What kind of acid did you make?

A. Do you want me to state the whole operation?

Q. Yes, pardon me.

A. And after this gas travels through this glover-tower it enters through a series of chambers.

Q. I want to know the size of them, that long building?

A. You want to know the size of them, yes. The chambers consist of about three hundred and sixty-five (witness taking a paper from his pocket to which he refers) hundred cubic feet of chamber space. It contains seven chambers; the first was 140 feet long, twenty feet high and twenty feet wide; the second, third and fourth chambers, the same size; fifth chamber was the same dimension but forty feet shorter; the sixth and seventh chamber was forty feet long and same dimensions. Then we took the gas from the last chamber and drew it with a fan through a series of scalo Gay-Lussac-Towers.

Q. That was what you call the tower building?

A. That was the tower building.

Q. That was at the south end?

A. At the south end, yes, where we also ran a solution of acid over where we recover the nitric fumes that pass through these towers. In other words, we assembled what we call nitros vitriol in those towers. That is about the way it is done.

Q. Then it went to a storage tank?

A. All the acid that was made, surplus acid, was sent to the storage tank.

Q. So far as the conduct of these fumes after they came from the smelter over to this acid department and began the route of travel you have spoken of, what were they contained in?

A. The gases?

Q. Yes?

A. Everything was lead.

Q. Everything was lead?

A. Everything was lead.

Q. And it was all inclosed?

A. And it was all inclosed.

Q. Now in this tower building, what was its dimensions?

A. The tower building, the tower building was forty-one feet six inches wide by ninety-six feet ten inches, I think it was, might be ninety-five feet, but it was in that neighborhood.

Q. In length?

A. In length.

Q. How high was the towers?

A. The two Gay-Lussac Towers forty-one feet and the Glover tower forty-two, and ten by eleven, ten feet one way and eleven feet the other.

Q. And three of those towers?

A. The Glover tower was ten by eleven and the Gay-Lussac was seven by eight.

Q. Now how many of those towers were there altogether?

A. Three.

Q. Their foundations were in this smelter that have been testified to?

A. The foundations of these towers were on the ground level.

Q. On the ground level, outside of the smelter?

A. Outside of the smelter.

Q. And with reference to this smelter where were they, north or south?

A. South.

Q. What was this smelter, that has been testified here and sometimes called a pool, when in operation?

A. We had no pool.

Q. What was in the smelter?

A. In the basement you mean?

Q. Yes?

A. Why in the basement we had these tanks receiving the acid from these towers.

Q. What were they called?

A. Tank, receiving tank.

Q. That what is sometimes called acid eggs?

A. No sir.

Q. How many of those tanks were there?

A. In that building?

Q. Yes?

A. Eight. The size of them seven feet in diameter and seven and one-half feet high.

Q. What was the size of the others, all the same size?

A. Yes. All the same size.

Q. Were there any other tanks in that room?

A. No sir.

Q. Any water tanks?

A. No sir.

Q. Well now in this sub-basement or down in this lower hole what was in there?

A. We had five blow cases, in other words, some people call them eggs.

Q. What was the purpose of those?

A. Sending the acid upstairs.

Q. Have you a cut of the floor of this tower building?

A. It is a beautiful one, I made it myself.

Q. It ought to be good then. Exhibit No. 11 is called to the witness' attention; is that a fairly good diagram of the floor plan of this tower building?

A. This?

Q. Yes?

A. Yes sir.

Q. Exhibit No. 12 is shown the witness; I will ask you to state whether or not that is a fairly good representation of the elevation?

A. Of the side elevation.

Q. And Exhibit No. 13?

A. Yes.

Q. I will ask you if that is what you mean by the acid eggs?

A. Blow cases or some people call them eggs.

Q. In this floor in the bottom of the tower and around where these eggs or blow cases were, was it level right up to the edge or was there a raise?

A. Raise of between eight, nine inches.

Q. In other words, water on the bottom of the basement would or would not run in it?

A. Could not.

Q. Was there a connection from the bottom of the basement?

A. In the basement there was a ten inch sewer.

Q. Who had charge there of the operation, the direct charge while you were there?

A. Of what?

Q. Of the manufacturing of sulphuric acid?

A. I did.

Q. And who had charge of the dismantling of the plant?

A. Of what?

Q. Of the sulphuric acid plant?

A. I did.

Q. Were you present there during all that time?

A. Yes sir.

Q. Were you present when the last equipment was removed from the acid department of the plant?

A. Acid department, *yas*.

Q. Did you hear the testimony of two gentlemen, a Mr. Lee and Mr. Stockton?

A. Yes.

Q. Were you present in Court?

A. Yes.

Q. Was there any substance such as described by Mr. Lee put into this basement or cellar while you were there?

A. State that again, will you please?

Q. Was there any substance, such as described by Mr. Lee, of which he said there was something like one hundred and fifty barrels of acid I believe he called it, put into this cellar while you were there in charge of this dismantling?

A. Why no, there was no such a thing; I heard Mr. Lee testify yesterday, and he mentioned something about putting in three or four barrels of a white stuff, which was true; that white stuff contained air slacked lime which we put in to absorb what little acid we spilled during the dismantling of the pipe lines, so men could walk around and not burn their shoes.

Q. Was that the only thing put in there at the time this was dismantled?

A. The only thing, *yes*.

Q. Was there ever any sulphuric acid either in liquid, cake or other form, put into this basement while you were there?

A. No sir.

Q. And you were there until everything was removed?

A. In the acid department.

Q. You heard some testimony on the part of some witness, I think Mr. Stockton, about the removal of pipes where sulphuric acid ran out and ran all around there?

A. Yes sir, it was not correct; I had charge of the construction of the plant and there was not a pipe line covered; I made a practice when building plants I never covered a lead or a line for the reason you cannot repair it and cannot see the leaks.

Q. If he dug up any pipe lines there about this plant, particularly the acid department, or any other department there, what were they?

A. Water lines, water line or gas.

Q. What was sulphuric acid worth per barrel, would you say, Mr. Friebe, at the time you dismantled this plant?

Mr. Oyler: Plaintiffs object as incompetent, irrelevant and immaterial, if the court please.

The Court: Answer.

A. About ten dollars a ton at that time.

Q. A barrel would be about what part of a ton?

A. A barrel or acid weighed about eight hundred pounds.

Q. Little less than half a ton?

A. Yes.

Q. Is sulphuric acid ever shipped, stored or handled in wooden barrels?

A. No sir.

Q. Or in any other kind of barrels?

A. We have to ship acid in iron drums. But we shipped all of our acid, all bought in car loads, shipped in drums.

Q. How far was it from this tower building where the storage tanks were where this acid was finally sent and loaded into the car?

A. What I call Number one Storage was probably sixty feet from the tower building west.

Q. West or near the spur track?

A. Right along side of the spur track.

Q. The two were there?

A. Number two tank was further north from there.

Q. Where was that place where you kept this nitric or sulphuric acid, whatever you used to start this accumulation?

A. Nitrate of soda?

Q. Yes?

A. We kept that very close to the north end fence; I can't get directions right.

Q. Several hundred feet from this tower place. Was caustic soda ever used at your plant there in any operation?

A. What kind of soda?

Q. Caustic?

A. No sir.

Q. Was caustic potash ever used at your plant in any operation?

A. No sir.

Q. Did this company ever maintain during its operation, or any other time, a pool for the purpose of running overflow or
101 accumulated sulphuric acid in?

A. No sir, worth too much money.

Q. Well, was it always confined in——

A. In lead storage tanks.

Q. Was there a place there Mr. Friebe during your occupation, or subsequent, to your knowledge, where waste water was accumulated in a pool or run into a pool?

A. No sir, the only pool we had on the plant was, I can show you on the map.

Q. Indicate it on the map?

A. The map don't show it. (Pointing.) Right on here back of the furnace. We built that pool so in the dry season we had water for the boilers.

Q. Southwest of the furnace?

A. Yes.

Q. What distance would you say that was from the excavation in question?

A. That must have been six hundred feet.

Q. Clear across the other side of the tract?

A. Yes.

Q. Did it ever come to your knowledge directly or indirectly that surface or other water had accumulated in the basement of this tower building?

A. No sir.

Mr. McClain: I want to offer these exhibits as a part of the memoranda of the witness' testimony. Exhibits 11, 12, 13.

Mr. Oyler: We have no objection.

(Exhibits Nos. 11, 12, and 13, above referred to, offered and received in evidence, are attached hereto and made a part hereof.)

Cross-examination.

Questions by Mr. Oyler:

Q. Mr. Friebe, you said there was a sewer in connection with this cellar?

A. Yes sir.

Q. Where was it?

A. In the basement.

Q. You don't mean in the center of the basement or the pit?

A. I don't mean the deepest basement, I mean the basement of the building.

Q. You mean there was a drain that drained the water off the basement floor?

A. Yes.

Q. You don't mean there was a sewer in the bottom of the pit in the center of the cellar?

A. No sir.

Q. How deep was that?

A. Basement four feet six inches from the ground level and the deeper part was five feet.

Q. Deeper than that?

A. Five feet deeper than that, nine feet from the ground up.

Q. Now then what were the dimensions of the center pit?

A. I have it on there; I think it was thirteen feet by thirty-three or thirty-four feet.

Q. Were you there when the towers were torn down?

A. Yes.

Q. How?

A. Yes sir.

102 Q. Was you there when the lead and all that stuff was taken away?

A. I beg your pardon. When the lead was cut down I was there.

Q. Who did that work?

A. Mr. Stark helped with it, Mr. Brassfield, Mr. William C. Smith, and I think Mr. Stockton worked there a while.

Q. The gentleman on the stand this morning?

A. Yes.

Q. Where did this sewer run to?

A. Down where the office was.

Q. Yes, which way was that?

A. East, west, just wait a minute, I will get the directions wrong here.

Q. Just take your time and figure it out, that is what I want to know?

A. Lanyon put that sewer in himself, on Fourth Street I think yes, Fourth Street.

Q. Do you know there isn't any sewer system in East Iola at all?

A. Yes sir, there was Mr. Lanyon's private sewer.

Q. Mr. Lanyon's private sewer?

A. When he built the plant.

Q. You mean the sewer in connection with Mr. Lanyon's home?

A. No sir.

Q. Where did he run it to finally, where did it go?

A. I can't name the place on Fourth Street there.

Q. You mean to tell the jury you had a sewer system running from this plant away up here on Fourth Street some place in the city of Iola?

A. Where is Fourth Street?

Q. We can find Fourth, that is easy enough. There is Fourth Street (indicating).

A. Where is the Creek?

Q. Down in here.

A. Emptied down in here into the main sewer.

Q. In the city limits?

A. Yes, emptied into some creek down there.

Q. Here is the only creek we have.

A. You know where Billy Smith lived?

Q. No, I don't know Billy Smith.

A. I want to get this right.

Mr. McClain: Don't tell him.

Mr. Oyler: That is what I am trying to get him to say.

Mr. McClain: The man has not been there recently.

A. In the Delplaine Addition, I remember now.

Q. You think now it run up to the Delplaine Addition?

A. Yes, it emptied right in here, right down in here somewhere.

Q. Were you there when it was put in?

A. Yes.

Q. You saw it put in?

A. No sir.

Q. But that was not deep enough to carry off the water in the center pit?

A. In the lower pit, no sir.

Q. Now, as these pipes were taken out, any of that sulphuric acid drained out?

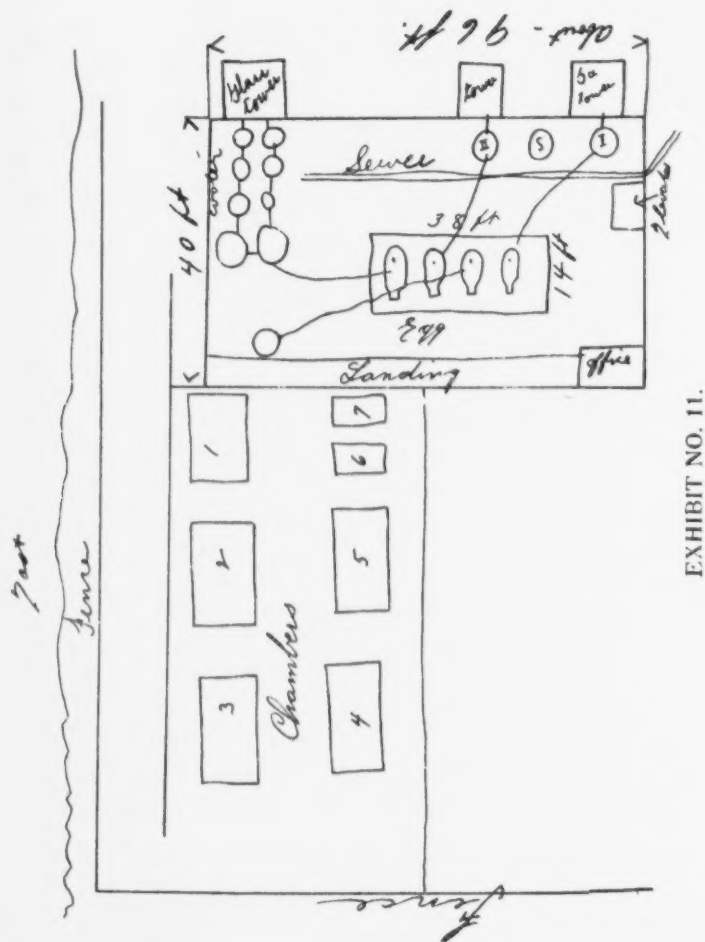
A. In what place?

(Here follow diagrams marked pages 102a, 102b, and 102c.)

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THE UNITED ZINC & CHEMICAL CO. VS. BRITT.

102-A





#603

THE UNITED ZINC & CHEMICAL CO. VS. BRITT.

102-B

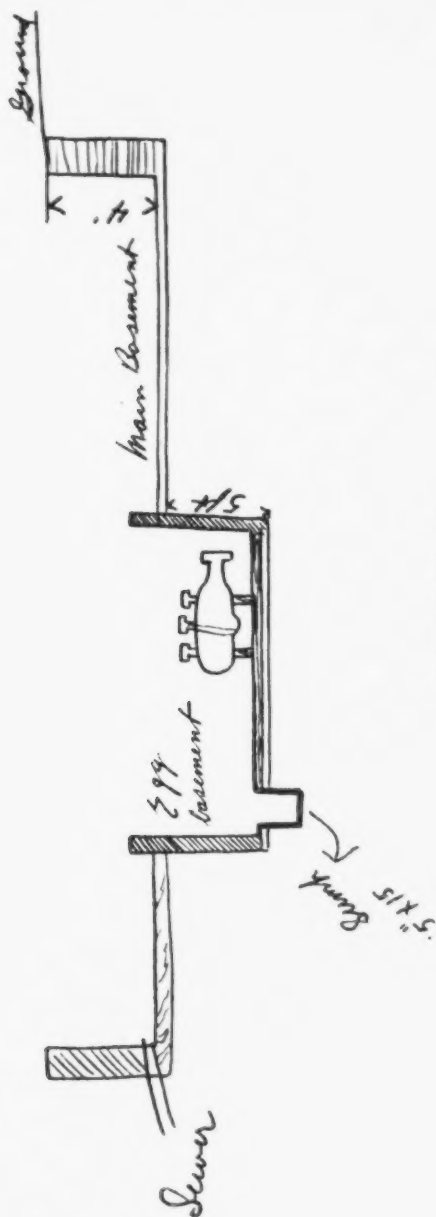


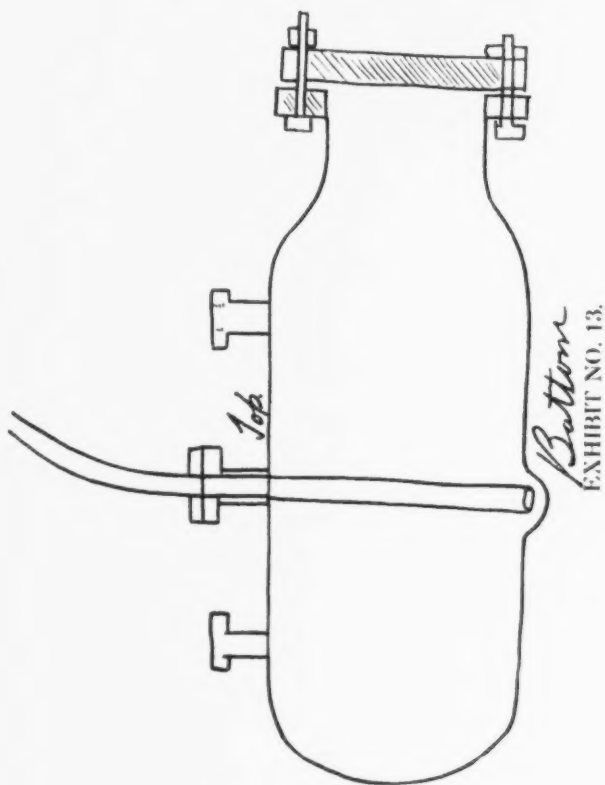
EXHIBIT NO. 12.



* 603

THE UNITED ZINC & CHEMICAL CO. VS. BRITT

102-C





- 103 Q. These lead pipes, these towers, where this lead was?
A. Yes sir, what did you say?
- Q. Was there any sulphuric acid in there?
A. No sir.
- Q. Your plant was the only one that manufactured sulphuric acid?
A. That is all.
- Q. In that whole country?
A. Yes sir.
- Q. You say there was no drains or places where the water could run into this cellar?
A. No drains for surface water?
- Q. Yes?
A. No sir, not while operating.
- Q. Well, after you quit operating was there?
A. No sir.
- Q. Wasn't there a lot of this stuff hauled up to the west side of the chamber building?
A. Yes.
- Q. And isn't that higher than this side?
A. Yes.
- Q. And didn't the surface water and this stuff run down into the cellar from there?
A. No sir, we had an open draw that run around the fence on the Prime Western ground.
- Q. Do you know whether that was filled up or not?
A. No sir it was open.
- Q. Did you hear the deposition of Mr. Davis read about that; he was your foreman, wasn't he?
A. My foreman?
- Q. Worked there as foreman for your company?
A. That draw was open, kept it open for that purpose.
- Q. It was while you were operating the plant, was it afterwards?
A. After I left I don't know, I left late in 1910.
- Q. After you left you don't know, and you left late in 1910?
A. Yes. We dismantled the whole acid works.
- Q. Where was it shipped to?
A. Argentine, Kansas.
- Q. To your plant there. You are still working for this company?
A. No sir.
- Q. You own an interest in the American plant over at Hillsboro don't you?
A. No sir.
- Q. Mr. Friebe have you been there since you left in September or latter part of 1910?
A. Been where?
- Q. Iola, Kansas?
A. Yes sir.
- Q. Before these little boys were killed, or since?
A. Since.
- Q. You weren't there before?

A. No sir.

Q. When you moved this stuff all away did you put up a fence or barriers of any kind around this pond?

A. When I left there, when we had that acid department dismantled, the fence was in fair shape around the plant site, not around the pond.

Q. You mean around the six or seven acres of land?

A. We had twenty acres of land, the fence was in fair shape, yes sir, and we also had signs of "Private Property."

Q. That was when you quit, while you was operating the plant?

A. Yes, and while we were tearing it down, the fence was in fair shape and signs still up.

Q. Was there any fence or protection around this pool or
104 cellar whatever you call it, any fence around the pond?

A. What pond?

Q. The cellar?

A. The basement you mean?

Q. Whatever you mind to call it?

A. Yes sir.

Q. Was there any fence around that?

A. No sir.

Q. Any warnings of danger?

A. There was no cause.

Q. Answer my question, did you do that?

A. No sir.

Mr. McClain: The buildings was up.

Redirect examination.

Questions by Mr. McClain:

Q. At the time you left the tower building was still standing?

A. Yes.

Q. What became of the tower building?

A. It was bought by Mr. William Lanyon, of St. Louis, Missouri.

Q. Had he dismantled it before you left?

A. No sir.

Q. Was he in process of dismantling before you left?

A. He had contracted with somebody to dismantle the building for him, and a man by the name of Mr. H— had charge of dismantling his part of it that he bought.

Q. But before that, before the building was sold, you had entirely removed all of the United Zinc and Chemical property from the building?

A. Of the acid department, yes sir.

(Witness excused.)

Mr. Robertson: I want to recall Mr. Brown for a few questions, if the court please.

The Court: Very well.

D. W. BROWN (recalled).

Cross-examination.

Questions by Mr. Robertson.

Q. In the dispensatory that you have read from, I call attention to page 70 under the head, "Toxicological Properties." Is that article regarding sulphuric acid? At the top of the page up there; don't read the article, look at the page and tell me whether it is about sulphuric acid?

A. Yes it is about sulphuric acid.

"Toxicological Properties. The symptoms of poisoning by this acid are the following. Burning heat in the throat and stomach, extreme fetidness of the breath, nausea and excessive vomitings of black or reddish matter, excruciating pains in the bowels, difficulty of breathing, extreme anguish, a feeling of cold on the skin, great prostration, constant tossing, convulsions, and death. Sometimes there is no pain whatever in the stomach, sensibility being apparently destroyed by the violence of the caustic action. The intellectual faculties remain unimpaired. Frequently the uvula, palate, tonsils and other parts of the fauces are covered with black or white sloughs. The treatment consists in the administration of large quantities of magnesia, or, if this be not at hand, or solution of soap or other alkali. The safety of the patient depends upon the greatest promptitude in the application of the antidote. After the poison has been neutralized, mucilaginous and other bland drinks must be taken freely."

"Upon the skin sulphuric acid acts as a very rapid and powerful corrosive. When it has been spilled or thrown upon the person the part should be immediately washed with a weak solution of sodium carbonate or bi-carbonate, or soap may be well rubbed into the surface. After the removal and neutralization of the acid Carron oil or similar protective may be applied. Further treatment is that of a burn. The holes burnt in linen by sulphuric acid, so long as the texture undisturbed, are distinguished from those produced by red hot coals, by the paste-like characters of their edges."

(Witness excused.)

RICHARD FRIEBEL (recalled).

Direct examination.

Questions by Mr. McClain:

Q. Mr. Friebel, zinc sulphate is a common product of the smelting of ores in that vicinity, was at the time, was it not?

A. Yes.

Q. Now Mr. Oyler on cross examination elicited the information that some substance was carried up north of this tower building by the tracks and stored, what was that?

A. That was the residue we received from the nitric department.

Q. Did that ever get into this smelter?

A. No sir, I told Mr. Oyler we had an open drain around the other way.

Q. Was there any residue taken out of anything in this cellar, anything in this basement?

A. There was nothing in that basement.

Q. I say, was that residue taken out of the basement or where was it procured?

A. It was procured where we made the nitric acid.

Q. Was that in the basement?

A. No sir.

Q. Where was it from the basement that you made nitric acid?

A. I will show you, right here, (pointing) right here.

Q. Well, what would you say, fifty or one hundred feet from this tower building?

A. About seventy-five feet from the tower building.

Q. Was this nitric cake a commercial product?

A. Yes.

Q. Was it sold?

A. Yes.

Q. Where was it stored?

A. In a brick building to the north of the nitric house.

106 Q. Stored there for the purpose of shipping it?

A. Stored there for the purpose of shipping it.

Q. And if any there, it was simply there awaiting shipment?

A. Yes.

(Witness excused.)

GEORGE B. LEWIS, called as a witness on behalf of the defendant, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. Ashley:

Q. Where do you reside, Mr. Lewis?

A. Kansas City?

Q. Are you an officer of the defendant company, and if so, what?

A. Secretary and Treasurer.

Q. Were you Secretary and Treasurer in September, 1910?

A. I was cashier at that time.

Q. When was the Iola plant of the United Zinc and Chemical Company built?

A. It was constructed about March 1902.

Q. How long was it operated?

A. Operated from that time until the summer of 1910, little over eight years.

Q. Why did it cease operation?

A. On account of the gas playing out in the district, not having enough gas and the operation became unprofitable.

Q. Is the United Zinc and Chemical Company engaged in this business anywhere in the United States, or elsewhere, is the United Zinc and Chemical Company actually engaged in the manufacturing business now?

A. No sir.

Q. There was some question asked by counsel, I have forgotten, as to whether the United Zinc and Chemical Company had an interest in the American Company over at Hillsboro; if I understand you correctly, they are not in fact operating a plant anywhere?

Mr. Oyler: If the Court please, plaintiffs object as incompetent, irrelevant and immaterial; I simply asked Mr. Friebe to determine his interest, if he had any.

The Court: Very well, this witness may answer.

A. No connection between the two companies.

Q. Now, from the time in 1902 when that Iola plant was constructed, up to the time of its being dismantled, did you frequently visit the Iola plant?

A. Yes sir, several times every year.

Q. At the time of the abandonment, besides yourself as secretary and treasurer, living in Kansas City, Missouri, who were the other officers of the United Zinc and Chemical Company?

A. Mr. John Adams was president.

107 Q. Where did he live?

A. He lived in Kansas City, Missouri, at that time, he went to Boston in 1911.

Q. He went to Boston in 1911, does he now reside in Boston?

A. Yes sir.

Q. After the plant had been dismantled and the lead chambers, were they sold, and the tower building; you heard Mr. Friebe testify; to whom was it sold?

A. The lead was sold to the National Lead Company, the buildings were sold to Mr. William Lanyon.

Q. In what way were they sold, who dismantled the building?

A. Mr. William Lanyon; we sold them to him, as they stood.

Q. You sold them to him as they stood, and he employed his own labor and contractor in dismantling them?

A. Yes.

Q. Now, I do not wish to take up more time than is necessary, or to go over, except in a general way; about how big a tract of land did that company own there?

A. About twenty acres.

Q. That is a fair representation of the shape of it?

A. Yes.

Q. These chambers and buildings have already been described and I will not take you over it again, the process, but the company made, as has been testified, you will say, sulphuric acid and spelter?

A. Yes.

Q. In the sulphuric acid they used these chambers buildings that are indicated there?

A. This is the chamber building here.

Q. The long building?

A. Yes.

Q. Now have you recently visited the Iola plant?

A. Yes sir.

Q. Were you able to locate the basement of the former tower building that has been talked about in evidence here?

A. Yes sir.

Q. Now that tower building as described by Mr. Friedel was about the dimensions he mentioned?

A. Yes sir.

Q. Ninety-five by what?

A. Forty I believe it was, about that size.

Q. Now, in the circulation of acid through the towers and up into the top of the towers, in what was the acid contained, what kind of metal?

A. Lead.

Q. Lead. There were a number of tanks, lead tanks, in the tower building or about the tower building in which were coils and the water being used for the purpose of cooling the acid, is that correct?

A. There were tanks in there with coils in them.

Q. And in the bottom of this pit there were acid eggs or pumps as have been described?

A. Acid eggs.

Q. This water that you saw there the other day, was there water in this basement at the present time?

A. Little standing on the surface.

Q. Little standing on the surface. I will ask you whether
108 the company during its operation at Iola ever maintained a pond of water for the purpose of carrying off its waste water for the operation of its plant?

A. No sir.

Q. Did the company in its process of manufacture of sulphuric acid and spelter at Iola ever use in its process caustic potash?

A. No sir.

Q. Did it ever use caustic soda?

A. No sir.

Q. When did you first learn of this tragedy of the two little boys of the plaintiff's?

A. About the first of August, a few days after it occurred.

Q. Did you ever learn prior to that time that there had been an accumulation of surface water in the basement of the old tower building? Do you know of such knowledge having ever come to any officer of the company?

A. No sir.

Q. Was there any officer of the company in a better position to learn of the accumulation of surface water in the basement of that old tower building?

Mr. Robertson: If the court please, plaintiffs object as calling for the conclusion of the witness.

The Court: Answer.

A. The other officers were in Boston.

Cross-examination.

Questions by Mr. Robertson:

Q. This corporation owns a zinc plant up at Kansas City, Kansas?

A. No, they own a chemical plant.

Q. They own an acid plant there; where else do they own acid plants?

A. No other.

Q. Who is operating this acid plant in Kansas City?

A. National Zinc Company.

Q. Where are the offices maintained of this defendant corporation now?

A. They have no office except with Ashley & Gilbert.

Q. Ashley and Gilbert; these two gentlemen here?

A. They have some papers stored there.

Q. These two gentlemen here, I asked you?

A. Yes sir.

Q. It is a pretty big plant up at Kansas City, Kansas, isn't it?

A. Quite a large plant.

Redirect examination.

Questions by Mr. Ashley:

Q. The National Zinc Company rents from the United Zinc and Chemical Company its Argentine plant, and pays therefor interest on a bonded debt of one million dollars and taxes on its plant.

109 Mr. Robertson: To which we object as incompetent, if the court please.

The Court: Answer; has not much to do with the case.

A. Yes.

(Witness excused.)

E. B. PAYNE, called as a witness on behalf of the defendant, having been first duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. Gilbert:

Q. State your name?

A. E. B. Payne.

Q. Where do you live?

A. Fort Scott, Kansas.

Q. How long have you lived there?

A. Twelve or fourteen years.

Q. What is your profession?

A. Physician.

Q. Are you still practicing and have been practicing for that length of time?

A. Yes.

Q. Did you hear the testimony of Doctor Sutcliffe in reference to the condition of the young Britt boy taken from the pond?

A. I did.

Q. I want to call your attention particularly to that part of his testimony where he said this boy's tongue was burned to a crisp did you hear that?

A. I heard where he spoke of the tongue being burned, something of that kind.

Q. Well, if the acid solution in that water was sufficient to do that to his tongue, what effect would that have upon his lips and body generally?

A. It would burn his lips and burn the whole surface of the body.

Q. Would the effect of that acid upon his body be to burn spots or would it cover his whole body?

A. It would be a general burn, be in solution in the water and be a general burn.

Q. If other people went into that water and were in ten or fifteen minutes and were diving and swimming in it, what effect—would the acid have the same effect upon them as upon the boy?

A. It certainly would.

Q. And if they came out of it without having their eyelids burned or their eyes burned, or their bodies burned, in your opinion, how would you account for that?

A. I don't know; ought to get the same effect on both individuals, both classes of people.

Q. Is sulphuric acid readily diffusible in water?

A. It is.

Q. If you put sulphuric acid in a body of water will it be disseminated equally throughout the water, throughout the whole pool?

A. Yes, it goes into solution.

110 Cross-examination.

Questions by Mr. Oyler:

Q. Doctor, sulphuric acid when it is diluted in water might have a very serious and dangerous effect on the mucous membrane and not affect the outer skin, might it not?

A. Well, if it was strong enough to burn the tongue or mucous membrane very seriously it would affect the skin, but would affect the mucous membrane more than the skin because it is very delicate.

Q. Now it would affect the skin of a boy of tender years quicker than a grown person, wouldn't it?

A. Slightly more, yes.

(Witness excused.)

Thereupon the defendant rests.

Thereupon, the plaintiffs, to further maintain the issues upon their part, produced and offered evidence, in rebuttal, as follows:

Doctor SUTCLIFFE, called as a witness on behalf of plaintiffs, in rebuttal, having been duly sworn, testifies, as follows:

Direct examination.

Questions by Mr. Oyler:

Q. Doctor, you live east of Iola?

A. Yes.

Q. In going to and from your home do you pass this United Zinc and Chemical Company grounds?

A. I do.

Q. You may state if you remember the flood that occurred there in 1915?

A. I do.

Q. Tell the jury whether or not the water came up to the United Zinc and Chemical Company's ground?

A. Will you allow me to show it on the map?

Q. Yes.

A. This is the Prime Western plant; now there is a small draw right in here; on the north side of the railroad track, the Iola Electric, the water came up in this draw; the water also backed up Kenneky Street; the water backed from this Creek at that time; the road here was bare, right along there.

Q. That is the Iola Electric?

A. Along the Iola Electric road; this is the highest point, right along there.

Q. Tell the jury whether or not the place where the Chemical Company's buildings were is higher than it is down there where the water was?

A. Yes, this is higher, probably two or three feet higher than it is down below.

Cross-examination.

Questions by Mr. McClain:

111 Q. As a matter of fact, Doctor, the week after the County Fair in 1915 the nearest a water-spout that has been in that county fell within a very short time?

A. Yes.

Q. And it centered up northeast of Iola, causing the rise of this creek?

A. The water backed up.

Q. And it caught people in bed, came up in such a hurry?

A. Yes.

Redirect examination.

Questions by Mr. Oyler:

Q. Are the Prime Western buildings on higher or lower ground than the United Zinc and Chemical Company plant?

A. Lower ground from right in front of the Prime Western; had three or four floods since I have been in Iola and none of the other floods has the water gone past the office of the Prime Western here, and usually extended up to right here. (Indicating.) The water had been there, that is the creek, crossing the road and in front of the Prime Western office, is the highest it ever went at any time.

(Witness excused.)

Mr. McClain: If the Court please, on the question of this flood, I do not know how material it is, but I have these four witnesses here to show the plain facts they refer to, if they will; that is, that the Prime Western grounds are higher than the United Zinc and Chemical Company ground.

Mr. Oyler: I don't think that would be proper sur-rebuttal.

Mr. McClain: We offer to prove by these four witnesses at this time this fact.

The Court: Bring on one of them and let's see about it.

Mr. BROWN, called as a witness on behalf of the defendant, in rebuttal, testifies as follows:

Direct examination.

Questions by Mr. McClain:

Q. Mr. Brown, you were sworn before in this case?

A. Yes.

Q. You heard the statement of Doctor Sutcliffe relative to the height of the ground on the Prime Western site, and particularly in the neighborhood of this basement, and the Prime Western plant site?

A. Yes.

Q. What will you say as to the relative height?

A. The furnace buildings they are about six feet higher than the boiler rooms and the boiler rooms are down here. The water put the fire out in the boilers; it backed up into the laboratory
112 and office and got into the laboratory, all over the floor and got in the desk, the first drawer of the desk, all the papers were soaked.

Q. But as compared with this basement over on the United Zinc and Chemical Company what is the comparative height of the two tracts?

A. The furnace buildings on the Prime Western, the furnaces themselves are higher than the water level, but the furnaces—smelt-

ers were clear full, couldn't work for three days on account of smelters being full of water.

The Court: Answer the question, you have not answered the question.

Q. Is the Prime Western Company plant higher than the basement where they call this pool?

The Court: The ground?

A. Yes.

Cross-examination.

Questions by Mr. Oyler:

Q. You mean to tell the jury that the grounds generally here where the Prime Western plant is located is higher than where the grounds of the United Zinc and Chemical Company plant is located?

A. Yes.

Q. You mean the natural lay of it?

A. Yes sir, I do.

Q. Is higher than this?

A. The buildings are all higher.

Q. Of course the buildings are higher?

A. I mean the ground level.

Q. Is the ground higher?

A. Yes sir.

Q. Don't you know the ground slopes gradually from there down to the creek from the United Zinc and Chemical plant, down to the east?

A. No sir, I don't know that.

Q. You don't know that?

A. No sir.

Redirect examination.

Questions by Mr. McClain:

Q. As a matter of fact the slope from the Prime Western grounds is west from this ditch?

The Court: Of course, if it is lower.

Mr. McClain: There is a ditch proposition here too. I offer to show these facts by the witnesses Wheeler, Gibson and Friebe.

Mr. Oyler: We object to Mr. Wheeler testifying, he had already been on.

The Court: I don't suppose it is very material.

Mr. McClain: I don't think it is very material, but I started to prove it and I want to finish it.

113 The Court: Will they so testify?

Mr. Robertson: I think they would.

(Witness excused.)

Thereupon, both plaintiffs and defendant rest.

Thereupon, the defendant presented to the court its requests for instructions, as follows:

Instructions Requested by Defendant.

At the conclusion of the entire case of both plaintiffs and defendant, attorneys for the defendant respectfully move and request the court to embody in his oral charge to the jury, the following:

1. The Court instructs the jury to find for the defendant.

If the court declines a peremptory instruction in behalf of the defendant, as requested in number one, attorneys for defendant respectfully request the embodiment into the oral charge, of the following:

2. The Court charges the jury on the first count of the petition praying for damages on account of the death of the younger boy, Edward Britt, about eight years of age, who was taken out of the water dead, that if they believe from the evidence that said boy Edward came to his death by drowning, then their verdict will be for the defendant on the first count of plaintiff's petition.

3. The Court charges the jury on the second count of the petition praying for damages on account of the death of the elder boy, Allen, about ten years of age, who lived some hours after getting out of the water, that if they believe from the evidence that said Allen Britt died from the effects of his going voluntarily into the water standing in the basement of the building on the land of defendant formerly known as the tower building in an effort to rescue his younger brother Edward, they will find for the defendant on the second count of their petition.

4. The court charges the jury that the mere fact that plaintiffs' two children lost their lives by going into this water standing in the basement of the dismantled tower building on the land belonging to defendant is not sufficient alone and by itself to make defendant liable to the parents of such boys for the death of such boys even if the jury believe that neither of said two boys would have lost their lives had said water been pure and wholesome.

5. The court charges the jury that they must find for the defendant if they believe from the evidence that neither of the sons
114 of plaintiffs saw the water standing in the basement of the old tower building until they had gotten upon the private property belonging to the defendant; provided said boys came upon such property without the knowledge or invitation of defendant or of any of its officers, agents or employees.

6. The court charges the jury that unless they find from the evidence that the place in which plaintiffs' children lost their lives was an attractive place for children of immature years to gather, congregate, enter, bathe and play, they will find for the defendant.

even though they find that the land where their death occurred belonged to defendant.

7. The court charges the jury that even if they believe from the evidence that water of a noxious or poisonous character was standing in the basement of the old dismantled building on the land of defendant September 28th, 1916, and that same was the cause of the death of either or both of plaintiffs' children, they still must find for the defendant unless they further believe from the evidence that defendant knew of the noxious or poisonous character of the water in said basement or should have known of it by the exercise of ordinary care.

8. The Court instructs the jury that if they believe from the evidence the boys Edward and Allen Britt on or about the afternoon of July 28, 1916, entered the premises of defendant company without the knowledge of defendant and without any leave, license or invitation, and without any allurement exerted upon them before their entrance upon defendant's land, they were trespassers and defendant owed them no duty except to abstain from willfully injuring them, and unless they find the defendant intended to injure them their verdict will be for the defendant.

9. The court instructs the jury that if they find from the evidence that the water by reason of which plaintiffs claim that their two sons lost their lives on or about July 28, 1916, had accumulated in the basement or cellar of a dismantled building on defendant's premises without the knowledge of defendant, and that basement or cellar was in the interior of a large tract of land owned by defendant and was remote from and invisible to those passing along the nearest highway, and the defendant left no poisonous materials in or about said basement or cellar at the time the building which covered said basement or cellar was removed on or about the fall of 1910 or 1911, then their verdict will be for the defendant.

BAXTER D. McCLAIN,
ASHLEY & GILBERT,
Attorneys for Defendant.

(Endorsed:) 289. Instructions requested by Defendant. Filed May 10, 1918. F. L. Campbell, clerk. C. N. Price, dep. clerk.

115 Thereupon, Mr. Robertson, of counsel for the plaintiffs, made to the jury an argument on behalf of the plaintiffs.

Thereupon, Mr. Oyler, of counsel for the plaintiff- made to the jury an argument on behalf of the plaintiffs.

Thereupon, Mr. Ashley, of counsel for the defendant, made to the jury an argument on behalf of the defendant.

Thereupon, Mr. Oyler, of counsel for the plaintiffs, made to the jury his closing argument on behalf of the plaintiffs.

Thereupon, the Court charged the jury, as follows:

Charge of the Court.

(POLLOCK, J.):

Gentlemen of the jury, again in the trial of this case, we have reached that place where it becomes the duty of the court to charge you as to the law which shall govern you in your deliberations upon a verdict in the case. In your presence, and your body constituted very nearly as it now is, I have heretofore endeavored to give you my conception of the duty of the jury and the court in cases tried as this one is being tried, to a jury and the court. In brief substance it is this: That the court, and the court alone, is the exclusive judge of the law of the case; the jury must take the law precisely as declared by the court. On the other hand, the jury, and the jury alone, is the exclusive judge of the weight of the evidence, the credibility of the witnesses and the facts proven on the trial of the case.

Gentlemen of the jury, bearing in mind the respective duties of your body, and the court, both as instrumentalities created by the law for the purpose of doing justice in our courts, I will proceed to define to you, as I understand it, what the issue is that is to be determined by your verdict in this case.

This is an action brought by Mr. and Mrs. Britt, who state they are and were at the time of the commencement of this action, or, at least were at the commencement of this action, citizens and residents of the state of Missouri, against the United Zinc and Chemical Company to recover damages from the defendant for the tragic death of their two boys, Edward Britt and Allen Britt, said to have been of the ages of eight and ten or eight and eleven years. That is, they charge the death of their children was occasioned by the wrongful act of the defendant in this case. The petition is in two counts, the first being a cause of action for the death of Edward, the older of the two boys; the second, being an action to recover the damages they have sustained for the death of their younger boy Allen. This is brought under a statute of this state allowing an action to be brought under the circumstances of this case by the plaintiffs. That the father and mother of these children, if citizens and residents of the

116 state of Missouri, under this statute, "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

There is another section that provides if these children were citizens and residents of the state of Missouri at the time they lost their lives, these parents residing there might bring it not in their representative but personal capacity.

The cause of action set forth here by the plaintiffs is this:

That this defendant had been for many years, operating a smelter and acid or chemical plant near the city of Iola; that this plant was dismantled by the defendant, I believe, in the latter part of the year 1910, that is, the buildings were torn down and removed. But it is charged by plaintiffs in this case that after the defendant had torn down and removed its buildings and machinery from this plant that it still continued to own the land on which this plant had been theretofore located. That the defendant allowed to be collected and stand there on these grounds a pool of water which in appearance was fresh, clear and healthful for any one to go bathing in, but, in truth and in fact, that the water in this pool, which was, under the evidence in this case, the basement of a building that had stood there in which the work of the defendant had been conducted, was impregnated with poisonous substances alleged in this petition to be a caustic potash, sulphuric acid and other deadly poisons, and that this pool was left there by the defendant wholly unprotected and in this condition, and either known to be so by the defendant, or so maintained, or by the use of ordinary prudence and caution they should have known of the deadly and dangerous character of this pool so standing there on these premises in the month of July 1916. That the plaintiffs in this case, Mr. and Mr. Van Britt, with their children, were traveling through the city of Iola; that they camped near this pool of water; that because of the season of the year, the day being hot, which is alleged to have been the 27th day of July, I believe, 1916, this pond of apparently clear and pure and fresh water, and healthful for bathing, attracted these children of tender years, and immature knowledge, to the pond. That the younger child first went into the pond to bathe, was overcome by the deadly poisons contained in this water and perished; that the older child, Edward, endeavoring to save the life of his little brother, plunged into the pool and he was overcome by reason of the poisonous character of the water in this pool, and although he was taken out and lived for the space of a day, or about that, thereafter, that because of the deadly and dangerous character of this pool that was so left there by the defendant, wholly unprotected from the invasion of these children, that he died, and this action is brought by the plaintiffs to recover the pecuniary loss they have sustained by reason of the tragic death of these little boys.

The defendant had the perfect right to construct and operate a chemical plant of this kind of these premises; had a perfect right to cease operating the plant and to abandon it, move it away. The plaintiffs in this case, said to be by the evidence here, citizens of the state of Missouri, had a perfect right to travel in a wagon, or any other way they saw fit; and the fact, I may say here gentlemen, that the plaintiffs were citizens of Missouri, traveling about the country in a covered wagon, in no manner affects their standing before this court or the right to recover if under the laws they are entitled to recover, and under the facts of this case, any more than if they had been citizens engaged in a different employment; and no more should the defendant, because of its corporate capacity, be charged

with a cent or a dollar here than if they were persons of precisely the same standing as the plaintiffs in the case. We lay those matters entirely out of the consideration and we view merely the rights of the parties under the facts and under the law.

It is true, if the deceased in this case had been persons of mature years and had gone upon these premises they would have been trespassers in law and the defendant would have been liable to them in case of accident or death to their representatives only for willful or wanton negligence. Now the law does look in a different manner toward infant children of immature years and having no experience in life and of less knowledge. The law does not hold them to the strict accountability as trespassers that it does adult persons.

The burden of proof is on the plaintiffs in this case. They must prove in this case by the greater weight of all the credible evidence, what? They must prove that this pond that had been allowed to accumulate here on the premises of this defendant was in the first place, by reason of the sulphuric acid or other poisonous substances which the defendant had left there, allowed to accumulate with the water in this basement into a poisonous pool such as was highly dangerous to life. In the second place, they must prove that this pond, left there as it was, thus impregnated with a deadly poison, on account of the fact of its apparent purity, apparent clearness and so on, was alluring to these children at a time in the year such as the 27th day of July would be in this country to go bathing. And that the children, having seen this pond, being attracted to it on account of the season of the year and a child's natural desire, if there be such a natural desire, in your judgment, to go in bathing on a hot or warm day in a clear and healthful looking pool.

118 If the plaintiffs have established these facts by the greater weight of all the credible evidence, that is, if you believe from all the creditable evidence this pool was impregnated with these poisonous substances which were highly dangerous to life, and were allowed to accumulate there, and remain there on these premises by the defendant, on its property, wholly unguarded and unprotected, and it was either known to be in such condition by the defendant, or, by the use of reasonable prudence the defendant should have known this fact, and you further believe from the greater weight of all the credible evidence in the case the children were, on account of the appearance of this pond or basement full of water, allowed to stand there in that shape, apparently clear and healthful but in fact deadly poisonous and thus they were allured to it and went in bathing, then the defendant in this case is liable to the plaintiffs.

There has been here the question of the knowledge of the defendant as to the condition there. The law on that matter is this: The defendant did know the business in which it was engaged here when it was conducting this chemical plant. The defendant did know, or at least is conclusively presumed to know, whether the products that were there manufactured and the agencies that were employed in this manufacture were or were not poisonous and dangerous to human life. It is presumed to have known that because it is the business in which it was engaged. If the defendants left in the

basement of this building from which it tore the building away these substances which were poisonous, and known to be so, and left this basement unprotected so if the water should fall or run into it in the natural course of nature and thus reach these poisonous substances, then the defendant would be presumed to know the result of this basement filling up with water and these poisonous substances. Or, if the defendant left knowingly about its plant there which it had abandoned, poisonous substances, such as it would know it was manufacturing there, in such proximity to the basement that the operation of the elements would take up and carry them into this pond in the natural course of events, and went off and left it wholly unguarded from approach by those who, like the children, might be allured to it, then it would be charged with knowledge as to what would naturally result from such a condition. So the question here is not altogether what the defendant did know, but it is what the defendant would be presumed to know, because the defendant would be presumed to know the natural and probable result of its own acts.

On the other hand, suppose these children were, so far as this case concerned, attracted there or allured there by this pond or basement full of water and did go in bathing in the water. If this pond or basement of water was not impregnated with sulphuric acid, caustic potash or other deadly substances, so that they were overcome by the water being poisoned; that is to say, if they went in bathing there and it was not on account of the poisoned condition of the water they lost their lives, but by drowning, the defendant in this case is not liable? As far as this case is concerned, in each event, the fault would not lie with the defendant, because one has a perfect right to maintain upon his premises a pond of water and if others are allured to that and attempt to use it, they would not be liable because a pond of water is not a highly dangerous agency such as this pond is alleged to have been. But the defendant in this case can be liable only in the event you find from the greater weight of all the credible evidence in the case that the premises, including this basement of water, or pond of water, as left there, was in its nature, and in its looks, on a day in July such as would be the 27th day of July in this country, both highly poisonous and alluring to the children, and if you further believe from the greater weight of all the credible evidence in the case that they lost their lives because of the fact that the pond was impregnated with this poisonous substance, of which the defendant either knew, or, by the exercise of ordinary prudence and caution for the protection of its property against a deadly or poisonous agency they would have had to have known. Gentlemen of the jury, in this case, if you believe, as claimed here by the plaintiff, and believe it by the greater weight of all the credible evidence- that this pond was poisoned, so that it was dangerous to the life of these children who you believe from the evidence could have protected themselves if it had been healthful water, and would have protected themselves in healthful water, but you further believe it was by reason of the poison in the water highly dangerous to them, and this danger was unknown to them, and if they were allured there to go in bathing believing it to be

healthful water in which to bathe, but on account of its deadly poison they lost their lives, and the defendant left the poisonous substance there in this basement, or where the natural working of the elements would carry it into and poison this pool, then, in that event, you will find for the plaintiffs.

But if the plaintiffs have failed to prove any of these conditions which they must prove on their part by the greater weight of all the credible evidence in the case, your verdict will be for the defendant on each of the counts.

In the event you find for the plaintiff how will you measure their recovery? These actions are brought to recover the pecuniary loss which the plaintiffs have suffered, as they say, from the death of their children by the wrongful act of the defendant, and there can be considered in cases of this character, and in this case, only the pecuniary loss suffered, if any. You cannot consider in this case the suffering these children underwent, if any. That was lost by the death of the children, it was their suffering, and was lost, and it is gone forever by their deaths. Neither can you consider

120 in this case the parental feeling, the anguish that parents would suffer from a double tragedy of this kind occurring to their children. All you can consider in the event you find for the plaintiffs will be, as I say, the pecuniary loss. That is to say, what these parents had the right to reasonably expect they would profit by the continued living of their children, of the ages that they were, with their qualifications, physical and mental, in so far as shown by the evidence, and that to be measured by you gentlemen, in the event you find for the plaintiffs, in dollars and cents, taking into consideration, of course, the age of the parents as you view that from whatever evidence there is in the case, the ages of the children, the expense they would be to, and again the material benefit or profit these children would have been to these parents if they had not perished but had continued to live out their allotted time.

Now, as I have said to you, you are the exclusive judges of the weight of the evidence, the credibility of the witnesses, the facts proven in the case. In considering this matter you will determine these propositions that I have submitted to you. And again I say, before the plaintiffs can recover in this case they must establish that this pool of water standing there and maintained by the defendant on its property was apparently clear, bright, healthful, but that appearances were deceitful, that in fact it was impregnated with these deadly poisons to such an extent that the children attempting to go in swimming in this pond were not drowned but by reason of the effect of these poisonous substances on them their lives were taken. That the condition of the pond was such that it would be alluring and attractive at the time of year and under the conditions which these children were there, and, further, that the defendant knew the condition of these premises or by the exercise of reasonable prudence and caution it should have known that its premises instead of being safe in this respect as to poison, that the waters were poisoned in this kind of a deadly manner. If

the plaintiffs have proven those matters, they are entitled to recover, if not, your verdicts will be for the defendant. And if you come to a verdict for the plaintiff you will estimate the pecuniary loss that they have suffered and return it in your verdict measured in dollars and cents.

Mr. Ashley: Your Honor, we desire to note an exception to the charge of the court, particularly to the matter of allurements, in view of the fact that there is no evidence that the water in the place could be seen from off the premises, and that the allurements must be before the children, who, if mature would be trespassers, come upon the premises.

The Court: I know you have that thought running through your minds from your request to charge.

Gentlemen of the jury, I believe the law to be this:

121 That the law excuses a child of immature years from the same obligation in regard to trespassing on others property that it does an adult. The adult knows more about property lines, property rights, than does the immature child. And if these children, being camped there with their parents were attracted onto these premises, although they may not have seen this pool when they were off the premises, yet, if anything, curiosity, or otherwise, brought them upon the premises of the defendant, and then they saw this pool, and on account of the weather, its apparent healthfulness and condition was attractive to these children to go in bathing, and they were thus allured to enter the pond, but still, if the pond was of the character charged here by the plaintiffs in this case, and they thus lost their lives, the defendant would be liable if it knew this pool was standing there thus poisoned, or, if by the exercise of reasonable caution and prudence in the maintenance of its property it should have so known; that is to say, if it knew it left there these poisonous substances, which mixed with this water would become impregnated in this pond, still, in such event, although the children may not have seen this pond from the highway, the defendant would be liable if the pond was left by defendant wholly unguarded.

Now, Mr. Ashley, I have brought out your point specifically and directly, now if you will except to that.

Mr. Ashley: Yes, we desire to except to that.

Mr. McClain: We also wish to except to the charge of the court on the ground, in the consideration of pecuniary benefit as to these minors, it should be limited to the time they reach their majority.

The Court: Now, gentlemen, in regard to that. Of course the parents of children are entitled to receive whatever they may earn until the child reaches its majority, which, in the case of a boy child is the age of twenty-one years, and what is customary and usual is the guide here. It would be reasonably thought when these boys reached mature age they would then take upon themselves the obligations men generally do and have a family of their own, but until they arrive at the age of twenty-one years, their earnings, whatever they would be, and also the care, the efforts they would bestow in taking care of their parents, would go to make up the reasonable

pecuniary value they might naturally expect to receive from their children.

Mr. Ashley: If the Court will pardon me, in your charge to the jury your Honor said, that you thought we might be liable for the action of nature, the elements, in bringing to this place poisonous substances. If it were a hidden danger—it seems to us there would have to be willful——

The Court: No, I say this: If you left there on your premises poisonous substances, which, by leaving the basement here, the building torn down, the roof torn off, etc., and which the elements would naturally gather up and deposit in this basin, I say if you knowingly left such poisonous substances there on your premises, which the natural operation of weather or water would gather up and deposit in this basin, you would be presumed to know the condition as it existed.

Mr. Ashley: We would like to save our exception to that.

The Court: All right.

Gentlemen, this is the last matter we have; you may retire to your jury room and consider your verdict. And while there are two counts, you may return your verdict, in the event you find for the plaintiff, you may consolidate and put all into one amount. Of, if your judgment is in favor of the defendant, there is a general verdict here for the defendant.

It is now five o'clock. I want you gentleman to consider the matter carefully. In the event you should arrive at a verdict in an hour or so, I believe there is a train leaves here at six forty. If you gentlemen have duly considered the matter and returned your verdict before that time, some of us, at least, will be enabled to get away. You may retire.

STATE OF KANSAS,

Wyandotte County, ss:

I, Elizabeth La Bar, the official stenographer who reported the proceedings and testimony in the trial of the above entitled cause, hereby certify that the above and foregoing is a full, true and correct transcript of all the proceedings and testimony, both oral and documentary, offered and introduced in the trial of the foregoing action, and also of all exceptions taken and noted, together with the instructions given in the charge of the court to the jury, and all exceptions and changes therein; and I now certify the foregoing to be such transcript; and

In Testimony Whereof, I hereunto have signed my name at Kansas City, Kansas, this sixth day of July, 1918.

ELIZABETH LA BAR.

Stipulation.

It is hereby stipulated between the parties hereto that the foregoing is a correct statement of the evidence offered and received on trial of the above case.

Dated this — day of July, 1918.

ASHLEY & GILBERT,
Attorneys for Plaintiff in Error.
F. J. OYLER,
FRED ROBERTSON,
Attorneys for Defendants in Error.

(Approval of Statement of Evidence by the District Judge.)

The foregoing statement of the evidence is hereby approved and ordered to be filed and made a part of the record in the above case.

Dated this 22nd day of July, 1918.

ARBA S. VAN VALKENBURGH,
Judge.

Stipulation.

It is hereby stipulated between attorneys for plaintiff in error and defendants in error, that whereas, the Hon. John C. Pollock, the Judge before *which* this case was tried, is disabled from signing the bill of exceptions in this case, by reason of his absence from his district in an inaccessible part of Canada on vacation, it is agreed that the complete transcript of all the evidence offered in this case as stipulated by counsel, may be signed, settled and allowed as the bill of exceptions in this case by Hon. Arba S. Van Valkenburgh, Judge of the United States District Court for the Western District of Missouri, and that neither party will raise any question in the United States Circuit Court of Appeals by reason of the foregoing.

ASHLEY & GILBERT,
Attorneys for Plaintiff in Error.
F. J. OYLER AND
FRED ROBERTSON,
Attorneys for Defendant in Error.

In the District Court of Allen County, State of Kansas, Sitting
Within and for the Thirty-seventh Judicial District.

No. 10993.

VAN BRITT and SUSIE BRITT, Plaintiffs,

vs.

THE UNITED ZINC & CHEMICAL COMPANY, Defendants.

*Petition for Removal to the Federal Court for Diversity of Citizen-
ship.*

To the Honorable Judge of the above-entitled Court:

Your petitioner, The United Zinc & Chemical Company, a corporation, appearing especially and for the purpose of this petition only, by Messrs. Baxter D. McClain and Ashley & Gilbert, its attorneys, and before time to answer or plead herein, respectfully shows to this Honorable Court:

124 That the matter and amount in dispute in the above entitled suit exceeds the sum or value of \$3,000.00 exclusive of the costs and interest.

That the controversy in said suit is, and at the time of the commencement of said suit was, between citizens of different states and that your petitioner, the defendant in the above entitled suit, was at the time of the beginning of this suit and still is a corporation created and existing under and by virtue of the laws of the state of New Jersey and consequently was and still is a resident and citizen of the State of New Jersey and a non-resident of the State of Kansas; and that the plaintiffs Van Britt and Susie Britt were, at the time of beginning this suit, and still are, residents and citizens of Iola, Allen County, Kansas.

Your petitioner offers herewith a good and sufficient bond with surety for its entering in the District Court of the United States for the District of Kansas, Third Division, thirty days from the date of filing this petition a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond, and cause the record herein to be removed into said District Court of the United States for the District of Kansas, Third Division and he will ever pray.

BAXTER D. MCCLAIN,
ASHLEY & GILBERT,
Attorneys for Petitioner.

STATE OF KANSAS,
Allen County, ss:

Henry D. Ashley being first duly sworn says:

That he is one of the attorneys for the petitioner, The United Zinc & Chemical Company, about named; that by reason thereof the facts alleged in said petition are within his personal knowledge as such attorney; that the United Zinc & Chemical Company is a non-resident of and is absent from Allen County, Kansas; and that affiant believes the facts stated in the above petition to be true.

HENRY D. ASHLEY.

Subscribed and sworn to before me this 22nd day of March, 1917.

[SEAL.]

CRAIGIE J. McDOWELL,

Notary Public.

My Commission expires Aug. 16, 1918.

Filed in District Court of Allen County, Kansas, March 23, 1917.

Filed in U. S. District Court April 20, 1917.

125 In the District Court of the United States for the District of
Kansas, Third Division.

No. 289.

VAN BRITT and SUSIE BRITT, Plaintiffs,

vs.

THE UNITED ZINC & CHEMICAL COMPANY, Defendants.

Motion to Remand.

Come now the above named plaintiffs and move this Honorable Court to remand the above and foregoing entitled case to the state court, to-wit: the District Court of Allen County, Kansas, from whence the same was improperly removed to this court, for the reason, that said petition shows upon its face that the plaintiffs were at the time of filing their petition in the District Court of Allen County, Kansas, resident citizens of Springfield, state of Missouri; and that the defendant was at the time of filing plaintiff's petition a foreign corporation, being organized under the laws of the state of Delaware. And plaintiffs and defendant both being resident citizens of foreign states, said case is not subject to removal to this court, and therefore, should be remanded to the District Court of Allen County, Kansas, from whence the same was removed.

Wherefore, plaintiffs pray that said case be remanded to the state court, to-wit: the District Court of Allen County, Kansas, for the reasons hereinabove set forth.

F. J. OYLER,

Attorney for Plaintiffs.

Filed in U. S. District Court May 2, 1917.

Memoranda of Decision on Motion to Remand.

This action was brought by plaintiffs in the state court against defendant, a corporate citizen of the state of New Jersey, which has removed it into this court. Plaintiffs move to remand.

The sole question relates to the citizenship of plaintiffs at the date the action was instituted. They say they were at said date citizens and residents of the state of Missouri. Defendant contends they were citizens and residents of this state, and on this question evidence has been taken from which the following facts are learned:

Plaintiffs formerly lived in the state of Missouri. For about ten years they have lived the greater part of the time in a covered wagon, carrying their entire household goods and effects with them. For some five years they have gone to the wheat fields of this state for the harvest season. One winter they rented a house and lived in the city of Emporia, this state. Sometimes they would stay with a sister of Van Britt in the city of Springfield, Missouri. The injury resulting in the death of their two children, for which this action is brought, occurred on July 28, 1916, at a time when they were living in a covered wagon camped near Iola, this state. About that time they rented a house in the city of Iola for the term of the month of

August. They were in the state when this action was in-
126 stituted although soon thereafter they left in their wagon for Springfield, Missouri. They had been sending their children to school in this state. They owned no property, had no permanent place of abode in the state of Missouri or elsewhere.

Under these facts it is very difficult to determine of what state plaintiffs were citizens. They were probably citizens of that state in which they chanced at the time to be with their team, wagon, belongings and family, which in this case chanced to be in this state at the time this action was instituted.

However, in this case there is no question of the jurisdiction of a Federal Court over the subject matter of the action, no contention but that the parties are and at all times were citizens of different states. Hence, under the facts as established I am of the opinion on this head, jurisdiction must be retained and the plea denied.

While it is not pleaded in the motion to remand, it is argued by plaintiffs defendant waived its right to remove by appearing and pleading to the merits of the case in the state court in this manner. At the beginning of the action in the State court a summons was issued and served on parties asserted to be agents and representatives of the defendant company. Also, a writ of attachment was issued and levied on real property of the defendant lying in this state. A special appearance was entered by defendant in the state court for the purpose of challenging the jurisdiction of that court over the person of defendant. Defendant also filed what it termed a special appearance and moved the state court to discharge the attachment. The state court held both of said applications to be special and not general appearances and sustained the same.

As the issuance and service of the summons was for the purpose of

requiring jurisdiction by the state court over the person of defendant, and as the purpose of the plaintiff in procuring the issuance and levy of the attachment on defendant's property located in this state was to either force defendant to come into the case generally and defend the same or to form a basis to obtain constructive service over the person of defendant and proceed against the property thus attached, I am of the opinion the action of the trial court was right. That both applications to make by the defendant to the state court went to the jurisdiction of the court over the person or property of defendant. However this may be, the action of the trial court, until the same is reversed, constitutes the law of the case, and is binding on this court.

It follows, the motion to remand, treated as a plea to the jurisdiction of the court, is overruled and denied. Defendant is granted thirty days from this date to plead or answer in the case.

It is so ordered.

JOHN C. POLLOCK,
United States Dist. Judge.

Kansas City, Kansas, June 13th, 1917.

Filed in District Court June 13, 1917.

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Order.

This court having carefully considered the motion heretofore, and on May 2, 1917, filed by plaintiff in the above entitled cause, praying that this cause be remanded to the District Court of Allen County, the court having carefully considered the depositions heretofore filed, and said motion having been submitted to the court on briefs filed by attorneys for both plaintiffs and defendant, and after hearing argument, the Court doth hereby order the said motion to remand this case to the District Court of Allen County, Kansas, filed by plaintiff, May 2d, 1917, be, and the same is hereby overruled.

JOHN C. POLLOCK,
U. S. Judge.

Kansas City, Kansas, June 12th, 1917.

Filed in District Court June 14, 1917.

Demurrer.

Now comes defendant and demurs to each of the two counts of plaintiffs' petition for the reason that said two counts of said petition fail to state a cause of action against defendant.

Wherefore defendant asks to be hence dismissed with its costs on this behalf sustained.

BAXTER D. McCLAIN,
ASHLEY & GILBERT,
Attorneys for Defendant.

Filed in District Court July 11, 1917.

Memoranda of Decision on Demurrer to Petition.

This action was brought by plaintiffs, the father and mother of Edward and Allen Britt, respectively aged at the time of their death July 26, 1916, eight and ten years, to recover damages sustained by reason of defendant's negligent acts which are alleged to have resulted in the death of their boys. The petition is in two counts. Defendant demurs to each of said counts generally for want of sufficient statement of facts.

At the outset it is noted the action is brought by plaintiffs in their personal rights and not in their representative capacities, from which fact it is by defendant insisted the demurrers must be sustained because the pleader drafting the petition fails to negative the existence of personal representatives of the deceased children. This position plaintiffs apparently concede as plaintiffs by their counsel ask to amend the petition by negating the appointment and qualification of any personal representative of the estates of the deceased children.

128 However, the statute of this state creating a liability for death by wrongful act of another and providing the terms and conditions imposed on its enforcement read, as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain as action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased." (7323, 7324, Gen. Stat. Kan. 1915.)

From which it appears if the deceased children at the date of their death had been citizens and residents of this state their parents could not, in the absence of an allegation in their petition of a failure of personal representatives and a showing of the truth of such allegations if denied, maintain this action. *Bastine v. Atchison, Topeka & Santa Fe Ry. Co.*, 71 Kan. 854; *Walker v. McConnell*, 59 Kan. 306. However, the petition in this case alleges, as follows:

"Plaintiffs for their cause of action against the defendant allege that they are and at all the time herein mentioned were husband and wife; that they are resident citizens of Springfield, Missouri, and their correct postoffice address is Springfield, Missouri."

Presumably, therefore, as plaintiffs were at the date of the death of their children and the bringing of this action resident in a foreign jurisdiction, their children of such tender ages as eight and ten were likewise at said dates citizens and residents of said foreign jurisdiction, and under such circumstances the statute permits them to bring and maintain this action in their personal rights as parents, in the first instance, without the amendment being made. *Railway Co. v. Fagardo*, 74 Kan. 314. I therefore find no necessity for the amendment requested.

The case of the plaintiffs as made by their petition is this: The family, consisting of plaintiffs and their two boys, in the month of July, 1916, traveled from Springfield, Missouri, in a covered wagon to the city of Iola, in this state, and on July 26th camped just east of said city and within a distance of two hundred yards of a pool of water standing on premises owned by defendant. That 129 formerly defendant had there engaged in the manufacture of spelter and sulphuric acid. That in said business it had employed large amounts of *accostic* potash and sulphuric acid, the same being deadly poisons. That in the year 1911 the defendant had ceased the business of manufacturing at said place, had torn down and removed all of its machinery from the premises, and all but one of its buildings employed in said business, but had left said pool of water standing on its premises, wholly unguarded and unprotected. That said pool of water while in appearance pure, clear and wholesome was in fact impregnated, and by defendant known to be so impregnated, with sulphuric acid and *accostic* potash and other deadly poisonous substances to such an extent as to be highly dangerous to human life. That the date July 26, 1916, was very hot, sultry and dusty. The boys of plaintiffs, being ignorant of the danger of so doing, determined to and did go in bathing in said poisonous pool of water with the result the elder, Edward, was almost instantly overcome and killed, and the younger son, Allen, in attempting to rescue his brother was so poisoned and injured he died the ensuing day.

Now by the demurrer interposed is raised this question:

May one on his own premises construct a pool or lake of water in appearance entirely pure, wholesome and proper for such use as bathing, abandon the premises, leave the poisonous pool entirely unguarded, unprotected and unwarned, and when such a terrible calamity befalls as in this case as the destruction of the two boys of plaintiffs, escape liability for loss sustained by their parents?

Defendant affirms this proposition by first contending this action is simply a common law action brought by the plaintiffs to recover damages for the loss of service of their dead sons, and is not an action based on the statute of this state above quoted which creates a cause of action for injury by wrongful act resulting in death. In this view of the case I do not agree with defendant. At the common law there was no recovery for an injury sustained resulting in death and so the law stood until the enactment in England of what is commonly known as Lord Campbell's act, on which act the foregoing statutory law of this state creating an action for such wrong done is

based. While it is true, in the absence of the foregoing statute of this state which creates a cause of action where none would exist at the common law the petition in this case would state no case, and while the petition may contain certain allegations pertinent to an action by parents to recover for loss of the service of their minor sons, yet, I have no doubt the pleader intended to and did so frame the petition in this case as to permit of a recovery from defendant for wrongfully causing the deaths of their sons under the law of this state as made by this statute, if, in fact, defendant did so
130 wrongfully cause said deaths as to be liable in damages therefor.

This brings me to the second proposition urged by the defendant in support of its demurrer and to a consideration of the merits of the case as pleaded and above stated.

That a pool of water, such as is described in the petition in this case, and so situated, would be most alluring to boys of the tender ages of deceased on a hot, sultry, Kansas late July day, is almost, if not altogether, a matter of common knowledge. That this pool was in appearance clear, pure and healthful for bathing purposes, but was in fact deadly poisonous and highly dangerous for such use, and by defendant known to be such, is admitted by the demurrer. Therefore, will the fact that deceased boys are to be regarded as technical trespassers in going upon said premises and entering said pool relieve defendant from liabilities under the facts pleaded? I think not, and for the following reasons.

The well known rule of what is commonly called the doctrine of the Turn-table cases, which rule, while repudiated by the courts of many states is now firmly established in the law of this state, and also by the Supreme Court of this country, is applicable here. *Railroad Company v. Stout*, 17 Wall. 657; *Union Pacific R. Co. v. McDonald*, 152 U. S. 262; *Baltimore & Potomac R. R. Co. v. Cumberland*, 176 U. S. 232; *Rome v. City of Leavenworth*, 95 Kan. 513; *Rice v. Water Company*, 58 Kan. 557; *Biggs v. Wire Company*, 60 Kan. 217; *Electric Light Company v. Healy*, 65 Kan. 798, and many other cases. Not only so, but on another principle of the law closely akin to that above stated, the pool of poisonous water standing on the premises of defendant, as is alleged in this case, must have been known to defendant and must be regarded by this court to contain as much of hidden danger and as fatal a death trap in its results as the setting of a spring gun, hence would fall under the rule in such cases. See *Palmer v. Gordon*, 173 Mass. 410.

It follows, the demurrer to the petition must be overruled, and the defendant, if so advised, ruled to answer within twenty days from this date.

It is so ordered.

JOHN C. POLLOCK,
Judge.

Kansas City, Kansas, November 9, 1917.

Filed Nov. 10, 1917.

Instructions Requested by Defendant.

At the conclusion of the entire case of both plaintiffs and defendant, attorneys for the defendant respectfully move and request the court to embody in his oral charge to the jury, the following:

1. The court instructs the jury to find for the defendant.

131 If the court declines a peremptory instruction in behalf of the defendant, as requested in number one, attorneys for defendant respectfully request the embodiment into the oral charge, of the following:

2. The court charges the jury on the first count of the petition praying for damages on account of the death of the younger boy, Edward Britt, about eight years of age, who was taken out of the water dead, that if they believe from the evidence that said boy Edward came to his death by drowning, then their verdict will be for the defendant on the first count of plaintiffs' petition.

3. The Court charges the jury on the second count of the petition praying for damages on account of the death of the elder boy, Allen, about ten years of age, who lived some hours after getting out of the water, that if they believe from the evidence that said Allen Britt died from the effects of his going voluntarily into the water standing in the basement of the building on the land of defendant formerly known as the lower building in an effort to rescue his younger brother Edward, they will find for the defendant on the second count of their petition.

4. The court charges the jury that the mere fact that plaintiffs' two children lost their lives by going into this water standing in the basement of the dismantled tower building on the land belonging to defendant is not sufficient alone and by itself to make defendant liable to the parents of such boys for the death of such boys even if the jury believe that neither of said two boys would have lost their lives had said water been pure and wholesome.

5. The court charges the jury that they must find for the defendant if they believe from the evidence that neither of the sons of plaintiffs saw the water standing in the basement of the old tower building until they had gotten upon the private property belonging to the defendant; provided said boys came upon such property without the knowledge or invitation of defendant or any of its officers, agents or employees.

6. The court charges the jury that unless they find from the evidence that the place in which plaintiffs' children lost their lives was an attractive place for children of immature years to gather, congregate, enter, bathe and play, they will find for the defendant, even though they find that the land where their death occurred belonged to defendant.

7. The court charges the jury that even if they believe from the evidence that water of a noxious or poisonous character was standing in the basement of the old dismantled building on the land of defendant Sept. 28th, 1916 and that same was the cause of the death of either or both of plaintiffs' children, they still must find for the defendant unless they further believe from the evidence that defendant knew of the noxious or poisonous character of the water in said basement or should have known of it by the exercise of ordinary care.

8. The court instructs the jury that if they believe from the evidence the boys Edward and Allen Britt on or about the afternoon of July 28, 1916, entered the premises of defendant without the knowledge of defendant and without any leave, license or invitation, and without any allurements exerted upon them before their entrance upon defendant's land, they were trespassers and defendant owed them no duty except to abstain from wilfully injuring them, and unless they find the defendant intended to injure them their verdict will be for the defendant.

9. The court instructs the jury that if they find from the evidence that the water by reason of which plaintiffs claim that their two sons lost their lives on or about July 28, 1916, had accumulated in the basement or cellar of a dismantled building on defendant's premises without the knowledge of defendant, and that basement or cellar was in the interior of a large tract of land owned by defendant and was remote from and invisible to those passing along the nearest highway, and the defendant left no poisonous materials in or about said basement or cellar at the time the building was covered, said basement or cellar was removed on or about the fall of 1910 or 1911, then their verdict will be for the defendant.

BAXTER D. McCLAIN,
ASHLEY & GILBERT,
Attorneys for Defendant.

Filed in District Court May 10, 1918.

Verdict.

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess damages at \$5,000.00.

C. O. BOLLINGER,
Foreman.

Filed in District Court May 10, 1918.

Journal Entry.

Now on this 9th day of May, 1918, one of the regular days of the May, 1918, Term, this cause came on regularly for trial, the plaintiffs appearing in person and by their attorneys, F. J. Oyler and

Fred Robertson, and the defendant appearing by its attorneys, Ashley and Gilbert, and Baxter D. McClain; and come also to try said cause twelve good and lawful men from the body of said district, to wit: J. D. Arnett, John Myers, Paul Mattox, C. O. Bollinger, E. Harris, Ray Paulen, F. B. Miller, W. K. Craig, Earl Payne, C. J. Hayes, T. J. Cummings, Jr., H. P. Waltse, and who were thereupon duly impaneled and sworn to well and truly try said cause according to the law and the evidence.

133 And now the hour for adjournment having arrived and the jury having been admonished as to their duties in the premises, the Court arose and the further hearing of this cause is adjourned until to-morrow morning, at 9:30 o'clock a. m.

And now on this 10th day of May, 1918, at the hour to which this cause was adjourned, the parties and the jury appear as on yesterday and the further hearing of this cause is resumed.

At the conclusion of plaintiffs' case comes the defendant and moves the Court for a directed verdict in favor of defendant in the nature of a demurrer, said demurrer being overruled by the court.

The parties introduce their evidence.

And now the parties having presented their arguments to the jury and the court having fully charged the jury as to the law applicable, the jury retire in charge of their sworn Bailiff to consider as to their verdict.

And now on this 10th day of May, 1918, the jury bring into the court their verdict which is in words and figures as follows, to wit:

Caption Omitted.

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess his damages at \$5,000.00.

C. O. BOLLINGER,

Foreman.

And said verdict is received and read in open court by the Clerk and is by the court ordered recorded in the records of the Clerk. Thereupon, it is ordered by the Court that the jury be and they are hereby discharged from further consideration of this case.

JOHN C. POLLOCK,

Judge.

Filed in District Court May 10, 1918.

Now, on this 10th day of May, 1918, this cause came on for further hearing and it is by the Court ordered and adjudged that the said defendant, The United Zinc & Chemical Company, pay the costs of this action taxed in the sum of \$— and accruing costs, and go hence without day.

And to the aforesaid verdict of the jury and order and judgment of the Court the said defendant duly excepted and still excepts.

JOHN C. POLLOCK,
Judge.

Filed in District Court May 10, 1918.

Motion for New Trial.

Now comes defendant and moves the court to set aside the judgment rendered in this case and award it a new trial, and for grounds for said motion says:

134 1. Because of abuse of discretion of the court in refusing to give the jury a peremptory instruction to find for the defendant.

2. The verdict of the jury against defendant was given under the influence of passion or prejudice.

3. That the verdict of the jury was in part contrary to the evidence.

4. For error of the court in charge of the jury, especially in the matter of the question as to the land belonging to the defendant being alluring or attractive to children of immature years in view of the undisputed fact as established by evidence that the surface water collected in the basement of the old tower building on the land of defendant was not visible from any point off the premises of defendant and until after plaintiffs' children had become trespassers.

5. For error of the court in declining to embody in the oral charge given by the jury the law as embodied in the request submitted by defendant's attorneys at the conclusion of the case and before the court had charged the jury.

6. For error of the court in failing to charge the jury separately on the first and second counts of plaintiffs' petition, although requested so to charge in writing by attorneys for defendant before the court had delivered its charge to the jury.

7. For refusal of the court to sustain the demurrer to the evidence offered by attorneys for defendant at the conclusion of plaintiffs' case.

Respectfully submitted.

BAXTER D. McCLAIN,
ASHLEY & GILBERT,
Attorneys for Defendant.

Filed in District Court May 13, 1918.

Order.

Now on this 18th day of June, 1918, this case comes further on for hearing, plaintiffs being present by their attorney, Fred Robertson, and the defendant being present by Henry D. Ashley, of Ashley & Gilbert.

The motion for new trial filed by defendant herein being duly presented and considered by the court, the court being well advised in the premises overrules same, to which the defendant excepts.

Upon application of plaintiffs it is ordered that the attachments heretofore levied upon real estate of the defendant be continued and preserved, to which the defendant excepts.

Upon application of defendant it is further ordered that the amount of the Supersedeas Bond to be given by defendant in this case be and the same is hereby fixed at Six Thousand Dollars (\$6,000), the same to be approved by the Deputy Clerk of this Court at Fort Scott.

It is further ordered by the court that defendant have to and including August 20th, 1918, within which to make, serve and have settled a bill of exceptions in this case.

And thereupon, the defendant presents its petition for Writ of Error which is accompanied by Assignments of Error which Petition is by the court allowed in and by its order, allowing a Writ of Error separate and apart from this one.

JOHN C. POLLOCK,

Judge.

Filed in District Court June 18, 1918.

Petition for Writ of Error.

The United Zinc & Chemical Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 10th day of May, 1918, comes now by Henry D. Ashley and William S. Gilbert, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Eighth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Eighth Circuit.

And your petitioner will ever pray.

ASHLEY & GILBERT,

Attorneys for Defendant.

Filed in District Court June 18, 1918.

Assignment of Errors.

Now comes the defendant in the above cause and filed the following Assignment of Errors upon which it will rely upon its prosecution of the writ of error in above entitled cause from the judgment rendered by this Honorable Court on the 10th day of May, 1918.

I.

Because the United States District Court for the District of Kansas, Third Division, erred in overruling the demurrer interposed by the defendant (now defendant in error) to the petition filed in the cause.

II.

136 Because the court erred, as shown by the record in this case in the following particular, namely; the court having found; on the trial of the only issue of fact involved in the motion to remand theretofore filed by the plaintiffs in this case; (such motion to remand having been made by plaintiffs below solely on the ground that the plaintiffs were both at the time of filing their petition residents of the State of Missouri); and on passing on demurrer to petition that such plaintiffs' children were at the time of their death citizens of the state of their parents' residence; nevertheless permitted plaintiffs below to go to the jury, without any allegation in their petition that no administrator had been appointed for either of the minor children of plaintiffs, for whose death this suit for damages was brought, notwithstanding the provisions of Sections 7323 and 7324 General Statutes of Kansas, and notwithstanding especially the following provisions of Section 7324:

"That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

III.

Because the court erred in allowing plaintiffs to introduce any evidence under the petition over the objection of defendant made at the beginning of the trial.

IV.

Because the Court erred in not peremptorily instructing the jury to find for defendant at the close of all the testimony.

V.

Because the Court erred in instructing the jury as follows: "Gentlemen, this is the last matter we have; you may retire to your jury room and consider your verdict, and while there are two counts, you may return your verdict—in the event you find for the plaintiffs—you may consolidate and put all into one count. Or, if your judgment is in favor of the defendant, there is a general verdict here for defendant."

VI.

Because the Court erred in refusing to embody in his oral charge the following as requested by defendant, viz., "The Court charges the jury on the second count of the petition praying for damages on account of the death of the elder boy, Allen, about ten years of age, who lived some hours after getting out of the water, that if they believe from the evidence that said Allen Britt died from 137 the effects of his going voluntarily into the water standing in the basement of the building on the land of defendant formerly known as the tower building in an effort to rescue his younger brother Edward, they will find for the defendant on the second count of their petition."

VII.

Because the Court erred in charging the jury as follows:

"Gentlemen of the jury, I believe the law to be this:

That the law excuses a child of immature years from the same obligation in regard to trespassing on others' property that it does an adult. The adult knows more about property lines, property rights, than does the immature child. And if these children, being camped there with their parents were attracted onto these premises, although they may not have seen this pool when they were off the premises, yet, if anything, curiosity, or otherwise, brought them upon the premises of the defendant, and then they saw this pool, and on account of the weather, its apparent healthfulness and condition was attractive to these children to go in bathing, and they were thus allured to enter the pond, but still, if the pond was of the character charged here by the plaintiffs in this case, and they thus lost their lives, the defendant would be liable if it knew this pool was standing there thus poisoned, or, if by the exercise of reasonable caution and prudence in the maintenance of its property it should have so known; that is to say, if it knew it left there these poisonous substances, which mixed with this water would become impregnated in this pond, still, in such event, although the children may not have seen this pond from the highway, the defendant would be liable if the pond was left by defendant wholly unguarded."

VIII.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

"The Court charges the jury that they must find for the defendant if they believe from the evidence that neither of the sons of plaintiffs saw the water standing in the basement of the old tower building until they had gotten upon the private property belonging to the defendant; provided said boys came upon such property without the knowledge or invitation of defendant, or of any of its officers, agents or employees."

IX.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

"The Court charges the jury that unless they find from the evidence that the place in which plaintiffs' children lost their lives was an attractive place for children of immature years to
138 gather, congregate, enter, bathe, and play, they will find for the defendant, even though they find that the land where their death occurred belonged to defendant."

X.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

"The court charges the jury that even if they believe from the evidence the water of a noxious or poisonous character was standing in the basement of the old dismantled building of the land of defendant July 28, 1916, was the cause of the death of either or both of plaintiffs' children, they still must find for the defendant unless they further believe from the evidence that defendant knew of the noxious or poisonous character of the water in said basement or should have known of it by the exercise of ordinary care."

XI.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

"The court instructs the jury that if they believe from the evidence the boys Edward and Allen Britt on or about the afternoon of July 28, 1916, entered the premises of defendant without the knowledge of defendant and without any leave, license or invitation, and without any allurement exerted upon them before their entrance upon defendant's land, they were trespassers and defendant owed them no duty except to abstain from wilfully injuring them, and unless they find the defendant intended to injure them their verdict will be for the defendant."

XII.

Because the Court erred in not embodying in his oral charge to the jury as requested by defendant the following:

"The court instructs the jury that if they find from the evidence that the water by reason of which plaintiffs claim that their two sons lost their lives on or about July 28, 1916, had accumulated in the basement or cellar of a dismantled building on defendant's premises without the knowledge of defendant, and that that basement or cellar was in the interior of a large tract of land owned by defendant and was remote from and invisible to those passing along the nearest highway, and the defendant left no poisonous materials in or about said basement or cellar at the time the building which covered said basement or cellar was removed on or about the fall of 1910 or 1911, then their verdict will be for the defendant.

XIII.

Because the court erred in charging the jury as follows:

139 "But the defendant in this case can be liable only in the event you find from the greater weight of all the credible evidence in the case that the premises, including this basement of water, or pond of water, as left there, was in its nature, and in its looks, on a day in July such as would be the 27th day of July in this country, both highly poisonous and alluring to the children and if you further believe from the greater weight of all the credible evidence in the case that they lost their lives because of the fact that the pond was impregnated with this poisonous substance of which the defendant either knew, or by the exercise of ordinary prudence and caution for the protection of its property against a deadly or poisonous agency they would have had to have known."

XIV.

Because the Court erred in charging the jury as follows:

"Gentlemen of the jury, in this case, if you believe, as claimed here by the plaintiff, and believe it by the greater weight of all the credible evidence that this pond was poisoned, so that it was dangerous to the life of these children who you believe from the evidence could have protected themselves if it had been healthful water, and would have protected themselves in healthful water, but you further believe it was by reason of the poison in the water highly dangerous to them, and this danger was unknown to them, and if they were allured there to go in bathing believing it to be healthful water in which to bathe, but on account of its deadly poison they lost their lives, and the defendant left the poisonous substance there in this basement, or where the natural working of the elements would carry it into and poison this pool, then, in that event, you will find for the plaintiffs."

Wherefore appellant prays that said judgment be reversed and that said District Court of the United States, for the District of Kansas, Third Division, be ordered to enter a judgment reversing the decision of the lower court in said cause.

ASHLEY & GILBERT,
Attorneys for Appellant.

Filed in District Court June 18, 1918.

Order Allowing Writ of Error.

Upon motion of Henry D. Ashley and William S. Gilbert, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of error, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is fixed at Six Thousand (\$6,000.) Dollars; to be approved by the Clerk of this Court, and it is further ordered that upon the giving of such security all further proceedings in this Court be suspended
140 and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Eighth Circuit.

Dated June 18th, 1918.

JOHN C. POLLOCK,
Judge.

Filed in District Court June 18, 1918.

Bond.

Know all men by these presents, that we, The United Zinc & Chemical Company as principal, and P. W. Goebel as surety, are held and firmly bound unto the above named Van Britt and Susie Britt in the sum of Six Thousand (6,000) Dollars lawful money of the United States, and to pay to them and their respective heirs, executors and administrators; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, administrators and successors, by these presents.

Sealed with our seals and dated this 18th day of June, 1918.

Whereas, the above named, The United Zinc & Chemical Company has prosecuted a writ of error to the United States Circuit Court of Appeals Eighth Circuit, to reverse the judgment of the District Court of the United States, District of Kansas, Third Division, in the above entitled cause.

Now therefore the conditions of this obligation is such that if the above named The United Zinc & Chemical Company shall prosecute its said writ of error to effect, and answer all damages and costs,

if it fail to make good its plea, then the above obligation shall be void, otherwise to remain in full force and effect.

[SEAL.]

THE UNITED ZINC & CHEMICAL CO.,
By GEO. V. LEWIS,
Secretary & Treasurer.
P. W. GOEBEL.

The within bond is approved as to sufficiency and form this 18 day of June, 1918.

C. N. PRICE,
Deputy Clerk.

This bond approved as to form only this 18th day of June, 1918.

JOHN C. POLLOCK,
Judge.

Mr. Price: This bond is O. K.

FRED ROBERTSON.

Filed in District Court June 18, 1918.

To the Honorable Frank L. Campbell, clerk of said Court:

141 Please prepare transcript of the record in the above entitled action for the use of the United States Circuit Court of Appeals for the 8th Circuit, same to consist of the following:

1. Petition filed in the District Court of Allen County, Kansas, August 11, 1916.

2. Petition for removal filed — —, — —.

3. Motion to remand filed May 2, 1917, in the District Court of the United States for the District of Kansas, Third Division.

4. Memorandum of decision on Motion to Remand filed June 14, 1917.

5. Order overruling motion to remand case to the District Court of Allen County, Kansas.

6. Demurrer to plaintiffs' petition filed — —, — —.

7. Memorandum of Decision on Demurrer to Petition filed November 10, 1917.

8. Answer filed — —, — —.

9. Charge of the Court.

10. Instructions requested by defendant.

11. Verdict.

12. Judgment.

13. Motion for new trial filed — —, — —.

14. Order overruling motion for new trial filed — —, — —.

15. Assignment of Errors filed June 18, 1918.

16. Petition for writ of error filed June 18, 1918.

17. Order allowing writ of error; fixing amount of supersedeas bond at \$6,000, the same to be approved by the Deputy Clerk at Fort Scott; filed June 18, 1918.

18. Supersedeas bond filed and approved — —, —.
19. Election as to printing.
20. Præcipe for transcript, with acknowledgement of service attached thereto.
21. Citation.
22. Bill of Exceptions, including oral evidence, depositions and copies of exhibits.
23. Clerk's certificate.

ASHLEY & GILBERT,
Attorneys for Plaintiffs in Error.

Service of a copy of the foregoing præcipe and a copy of the bill of exceptions hereby acknowledged this 13th day of July A. D. 1918.

By F. J. OYLER AND
FRED ROBERTSON,
Their Attorneys.

Filed in District Court July 15, 1918.

142

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Frank L. Campbell, Clerk of the District Court of the United States for the District of Kansas, do hereby certify the within and foregoing to be a full, true and complete transcript of the pleadings, proceedings and record, now on file and of record in my office, in a certain cause lately in said court pending, wherein Van Britt and Susie Britt are plaintiffs and The United Zinc and Chemical Company is defendant, as it purports to contain, and is made pursuant to the præcipe filed herein.

I further certify that the original writ of error and the original citation in this cause are transmitted herewith.

In testimony Whereof, I hereunto set my hand and affix the seal of said court, at my office in Fort Scott, in said District of Kansas, this 10th day of August, A. D. 1918.

A. D. 1918.

[SEAL.]

FRANK L. CAMPBELL,
Clerk,

By C. N. PRICE,
Deputy Clerk in Charge of the Third Division.

- 143 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Plaintiff in Error.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5239.

THE UNITED ZINC AND CHEMICAL COMPANY, Plaintiff in Error,

vs.

VAN BRITT et al.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

HENRY D. ASHLEY.
WILLIAM S. GILBERT.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 24, 1918.

(Appearance of Mr. Fred Robertson as Counsel for Defendants in Error.)

The Clerk will enter my appearance as Counsel for the Defendants in Error.

FRED ROBERTSON,
Kansas City, Kan.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 11, 1918.

- 144 *(Appearance of Mr. F. J. Oyler as Counsel for Defendants in Error.)*

The Clerk will enter my appearance as Counsel for the Defendants in Error.

F. J. OYLER,
Iola, Kansas.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1918,

(Order Passing Case to Foot of Call for January 29, 1919, to Enable Counsel for Plaintiff in Error to Have a Copy of Final Judgment of District Court Certified to This Court.)

December Term, 1918.

Thursday, January 16, 1919.

This cause having been called for hearing in its regular order, argument was commenced by Mr. William S. Gilbert for plaintiff in error and it appearing that the record does not contain a copy of the final judgment of the District Court, this cause is thereupon passed to the foot of the call for January 29, 1919, to enable counsel for plaintiff in error to have certified to this Court a copy of the final judgment of the District Court.

(Motion of Plaintiff in Error for a Continuance.)

Come now Henry D. Ashley and William S. Gilbert, attorneys for plaintiff in error in the above entitled case, and respectfully
145 pray the Court for a continuance of this case over the present term for the following reason:

It would appear from the transcript of the record filed in this case, and especially from page 133 of such transcript that no final judgment had been rendered against the defendant (plaintiff in error) in the District Court, and by reason of such state of the transcript this court has suggested to the attorneys for the plaintiff in error that the court in the present state of the record might have no jurisdiction.

In view of the fact that the attorneys for the defendant in error probably contemplate taking some steps in the District Court of the United States, for the District of Kansas, from whence this case has been brought by writ of error, seeking to change the record in said District Court, the attorneys for plaintiff in error respectfully ask that this case be continued over the term.

Respectfully submitted,

HENRY D. ASHLEY,
WILLIAM S. GILBERT,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 27, 1919.

(Motion of Defendants in Error to Dismiss.)

Come now the Defendants in Error and move this Honorable Court to dismiss the above entitled cause for the reason that the record discloses that this Court has no jurisdiction of the question attempted to be presented by the record filed herein for:

146 First. That said record discloses that there is no bill of exceptions signed and properly authenticated as provided by Section 953 of the U. S. Revised Statutes.

Second. That said record fails to disclose any final judgment rendered by the trial court from which an appeal could properly be taken to give this Court jurisdiction to hear and determine the question attempted to be presented by the record in said cause.

FRED ROBERTSON,
F. J. OYLER,
Counsel for Defendants in Error.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 29, 1919.

(Judgment.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1918.

Wednesday, January 29, 1919.

No. 5239.

THE UNITED ZINC AND CHEMICAL COMPANY, Plaintiff in Error,

VS.

VAN BRITT and SUSIE BRITT.

In Error to the District Court of the United States for the District of Kansas.

This cause came on to be heard on the motion of counsel for plaintiff in error for a continuance over the present term and on the motion of counsel for defendants in error to dismiss, Mr. F. J. Oyler appearing in support of the motion to dismiss.

147 On consideration whereof, it is now here ordered by this Court that the motion for a continuance be, and the same is hereby, denied, and the motion of defendants in error to dismiss granted.

It is, therefore, ordered and adjudged by this Court that the writ of error in this cause be, and the same is hereby, dismissed with costs, without the filing of an opinion, and that Van Britt and Susie Britt have and recover against The United Zinc and Chemical Company the sum of twenty dollars for their costs herein and have execution therefor.

January 29, 1919.

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Kansas, as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of all the pleadings, record entries and proceedings, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein The United Zinc and Chemical Company was Plaintiff in Error, and Van Britt, et al., were Defendants in Error, No. 5239, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the first day of April, A. D. 1920, a mandate was issued out of said Circuit Court of Appeals, directed to the Judges of the District Court of the United States for the District of Kansas.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this nineteenth day of October, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

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Vol. 2.

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1919, of said Court, before the Honorable William C. Hook and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Robert E. Lewis, District Judge.

Attest:

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the twelfth day of June, A. D. 1919, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the United Zinc and Chemical Company was Plaintiff in Error, and Van Britt, et al., were Defendants in Error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (*Writ of Error and Clerk's Return.*)

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Third Division of the Judicial District of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the May Term, 1919, thereof, between United Zinc and Chemical Company, Plaintiff in error and Van Britt and Susie Britt, defendants in error, a manifest error hath happened, to the great damage of the said United Zinc and Chemical Company, Plaintiff in error as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the Third (3d) day of July, 1919, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 5th day of May, in the year of our Lord one thousand nine hundred and nineteen (1919).

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Issued at office in the City of Fort Scott, with the seal of the District Court of the United States for the Third Division of the Judicial District of Kansas, dated as aforesaid.

[Seal of the U. S. Dist. Court, Third Division, Judicial District of Kansas.]

F. L. CAMPBELL,
Clerk District Court United States, Third
Division of the Judicial District of Kansas,

By C. N. PRICE,
Deputy Clerk.

Allowed by
JOHN C. POLLOCK,
Judge.

Return to Writ.

UNITED STATES OF AMERICA,
Third Division of the Judicial District of Kansas, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said District Court, at office in the City of Fort Scott, this 11th day of June, A. D. 1919.

[Seal of the U. S. Dist. Court, Third Division, Judicial District of Kansas.]

FRANK L. CAMPBELL,
Clerk of said Court,
By C. N. PRICE,
Deputy Clerk in Charge of the Third Division.

Endorsed: Filed in the District Court on May 5, 1919.

3 *(Citation and Acceptance of Service.)*

The United States of America to Van Britt and Susie Britt, defendants in error, or to Fred Robertson and F. J. Oyler, their attorneys of record, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the Third Division of the Judicial District of Kansas, wherein United Zinc and Chemical

Company is Plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, this 5th day of May in the year of our Lord one thousand nine hundred and nineteen (1919).

JOHN C. POLLOCK,

United States District Judge for the District of Kansas.

Service of the within citation this day accepted, dated May 5th, 1919.

FRED ROBERTSON,

Attorney for Defendant in Error.

Endorsed: Filed in the District Court on May 5, 1919.

* * * * *

(Here follows copy of Citation which is omitted at this point to avoid duplication, the original of which appears at marginal page C of this printed record.)

* * * * *

(Here follows copy of Writ of Error which is omitted at this point to avoid duplication the original of which appears at the beginning of this printed record.)

4 (Mandate of the U. S. Circuit Court of Appeals, Eighth Circuit, April 1, 1919.)

UNITED STATES OF AMERICA, ss:

[SEAL.]

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Kansas, Greeting:

Whereas, lately in the District Court of the United States for the District of Kansas, before you, or some of you in a cause between Van Britt and Susie Britt, Plaintiffs, and The United Zinc and Chemical Company, Defendant, wherein the Judgment of the said District Court in said cause, entered on the 10th day of May, A. D., 1918, was in favor of the said Plaintiffs and against the said Defendant, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears;

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